

Applicant Details

First Name **Danny**
 Last Name **Shokry**
 Citizenship Status **U. S. Citizen**
 Email Address ds1768@georgetown.edu
 Address

Address
Street
46 Oak Lane
City
Staten Island
State/Territory
New York
Zip
10312

Contact Phone Number **(347) 612-5549**

Applicant Education

BA/BS From **Cornell University**
 Date of BA/BS **May 2021**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 1, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Georgetown Environmental Law Review**
 Moot Court **No**
 Experience

Bar Admission

Prior Judicial Experience

Judicial Internships/
 Externships **Yes**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Heinzerling, Lisa
heinzerl@law.georgetown.edu
Tobia, Kevin
kt744@georgetown.edu
Donohue, Laura
lkdonohue@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Danny Shokry
46 Oak Lane
Staten Island, NY 10312
ds1768@georgetown.edu | (347) 612-5549

June 12, 2023

The Honorable Judge Juan Sanchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Juan Sanchez:

I am a second-year law student at Georgetown University Law Center. I am writing to apply for a clerkship in your chambers for the 2024 term, or any term thereafter.

My transcript, resume, writing sample, and letters of recommendation are enclosed. My recommenders are:

Professor Laura Donohue
(202) 662-9455
lkdonohue@law.georgetown.edu

Professor Liza Heinzerling
(202) 662-9115
heinzerl@georgetown.edu

Professor Kevin Tobia
(202) 662-9771
Kevin.Tobia@georgetown.edu

Please let me know if I can provide any additional information. I can be reached at (347) 612-5549 or ds1768@georgetown.edu. Thank you for considering my application.

Sincerely,



Danny Shokry

Danny Shokry

2337 18th St NW, Washington, D.C. 20009
ds1768@georgetown.edu | (347) 612-5549

EDUCATION

Georgetown University Law Center

Juris Doctorate

Washington, D.C.
Expected May 2024

GPA: 3.77

Honors: C. Keefe Hurley Scholar; Endowed Opportunity Scholar; Dean's List, 2021-2022

Activities: OutLaw (Secretary); Middle Eastern North African Law Students Associations (Treasurer); Georgetown Environmental Law Review (Staff Editor and Executive Editor); RISE Scholar; Constitutional Law I RISE Tutor; Criminal Justice Tutor; Law Library Reference Desk Clerk

Cornell University, College of Arts and Sciences

Bachelor of Arts in Biological Sciences, with a concentration in Neurobiology and Behavior

Ithaca, NY
May 2021

Minors: Environmental & Sustainability; Law and Society

Honors: Dean's List, 2018 - 2020; American Mock Trial Association All-American Witness, 2018

Activities: Mock Trial (Captain and E-Board), 2017 - 2021; Cornell Arts & Sciences Ambassador and Peer Advisor, 2019 - 2021; Undergraduate Teaching Assistant, 2021; Student Hospitality Worker, 2017 - 2020

EXPERIENCE

Selendy Gay Elsberg

Summer Associate

Washington, D.C.
May 2023 – Present

Georgetown University Law Center

Graduate Research Assistant for Professor Tobia

Washington, D.C.
Jan 2022 – Dec 2022

- Identify and label metalanguage (language that describes or analyzes other language) and respective cues in Supreme Court opinion to create a data bank for artificial intelligence training
- Collected data about current Supreme Court Justices' language in past scholarship about what constitutes "a reasonable person"

United States District Court for the District of Columbia

Judicial Extern for Judge Christopher R. Cooper

Washington, D.C.
Aug 2022 – Nov 2022

- Researched and drafted bench memoranda in response to multiple cases, including settlement disputes and FSIA cases
- Provided legal research and editing support to law clerks and judge preparing bench memoranda and draft opinions

Beck Redden

Summer Associate

Houston, TX
May 2022 – June 2022

- Managed a contract dispute case under attorney supervision, including researching applicable statutes and case law, deciding venue, drafting a complaint, and communicating with the client
- Observed depositions and discussed effective strategies with attorneys

Cornell Defenders

Undergraduate Intern

Ithaca, NY
June 2020 – Aug 2020

- Provided legal research to public defenders representing indigent defendants in criminal and family law matters

INTERESTS

American Sign Language; small boat sailing; bouldering

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Danny Shokry
GUID: 821601746

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2021 -----							
LAWJ	001	91	Civil Procedure	4.00	A-	14.68	
			Kevin Arlyck				
LAWJ	004	11	Constitutional Law I: The Federal System	3.00	A	12.00	
			Laura Donohue				
LAWJ	005	13	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Kristen Tiscione				
LAWJ	008	91	Torts	4.00	A-	14.68	
			Girardeau Spann				
			EHrs QHrs QPts GPA				
Current			11.00 11.00 41.36 3.76				
Cumulative			11.00 11.00 41.36 3.76				
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2022 -----							
LAWJ	002	12	Contracts	4.00	A-	14.68	
			Nakita Cuttino				
LAWJ	003	12	Criminal Justice	4.00	A-	14.68	
			Paul Butler				
LAWJ	005	13	Legal Practice: Writing and Analysis	4.00	B+	13.32	
			Kristen Tiscione				
LAWJ	007	91	Property	4.00	A-	14.68	
			Michael Gottesman				
LAWJ	1349	50	Administrative Law	3.00	A-	11.01	
			Lisa Heinzerling				
LAWJ	611	06	World Health Assembly Simulation: Negotiation Regarding Climate Change Impacts on Health	1.00	P	0.00	
			Kathryn Gottschalk				
Dean's List 2021-2022							
			EHrs QHrs QPts GPA				
Current			20.00 19.00 68.37 3.60				
Annual			31.00 30.00 109.73 3.66				
Cumulative			31.00 30.00 109.73 3.66				

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2022 -----							
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program)		NG		
			Sandeep Prasanna				
LAWJ	1491	119	~Seminar	1.00	A	4.00	
			Sandeep Prasanna				
LAWJ	1491	121	~Fieldwork 3cr	3.00	P	0.00	
			Sandeep Prasanna				
LAWJ	165	07	Evidence	4.00	A	16.00	
			Gerald Fisher				
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems	2.00	A-	7.34	
			Kevin Arlyck				
LAWJ	1711	05	Separation of Powers Seminar: Hot Topics in Scholarship	3.00	A	12.00	
			Josh Chafetz				
LAWJ	317	05	Negotiations Seminar	3.00	A	12.00	
			Kondi Kleinman				
In Progress:							
			EHrs QHrs QPts GPA				
Current			16.00 13.00 51.34 3.95				
Cumulative			47.00 43.00 161.07 3.75				
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2023 -----							
LAWJ	146	08	Environmental Law	3.00	A-	11.01	
LAWJ	178	05	Federal Courts and the Federal System	3.00	A-	11.01	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
LAWJ	351	08	Trial Practice	2.00	A	8.00	
----- Transcript Totals -----							
			EHrs QHrs QPts GPA				
Current			12.00 12.00 46.02 3.84				
Annual			28.00 25.00 97.36 3.89				
Cumulative			59.00 55.00 207.09 3.77				
----- End of Juris Doctor Record -----							

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Danny Shokry for a judicial clerkship with you.

I am lucky enough to have had Danny as a student in two of my courses so far: Administrative Law (taught as a first-year elective) and Environmental Law. Through discussions in the classroom and in office hours, I feel I've come to know Danny well. He is a wonderful person, with an infectious cheerful disposition despite the seriousness with which he takes his studies. In both of my classes, Danny was an indispensable part of the classroom dialogue, weighing in with a healthy skepticism about agencies' and courts' approaches to the legal questions we were studying and continually bringing in relevant insights from adjacent areas of law. Danny earned an A- on the final exams in both courses, having written well-constructed exams that made excellent use of a large range of the topics we had covered. From Danny's law school transcript, which reports an impressive overall GPA of 3.75 through the fall semester of 2022, one can see that Danny's fine performance in my classes is of a piece with his other academic work.

Danny has also flourished outside of the classroom. He is an editor of the *Georgetown Environmental Law Review*, a tutor in Criminal Justice, the Treasurer of the Middle Eastern North African Law Students Associations, and the secretary of OutLaw. He has externed for Judge Christopher Cooper of the federal district court in D.C. During his undergraduate years at Cornell, Danny studied biological sciences with a focus on neurobiology and behavior, and paired his studies with laboratory research on memory formation. Danny is thus an atypical law student insofar as he is as comfortable with scientific and quantitative concepts as he is with legal argument. As a member of Cornell's mock trial team, Danny was ranked at nationals as the best individual participant in the whole competition. Danny is, in short, a person of wide-ranging interests and multiple talents.

Danny's achievements are all the more remarkable when one knows something about his personal background. Danny is a RISE Scholar at Georgetown. RISE is a program created to serve law students who come from backgrounds that have historically been underrepresented in the legal academy and profession. Danny comes from a family of Coptic Christians from Egypt. After his father was kidnapped and tortured on account of his religious views, the family fled to the United States to escape persecution. Danny was 7 years old and spoke little English. While taking English as a Second Language for six years after coming to this country, Danny fell in love with math and science, eventually pivoting to an interest in law as a consequence of reading and appreciating the Supreme Court's pathbreaking opinion in *Obergefell v. Hodges*. Rereading Danny's exams from my courses for the purpose of writing this letter, I marveled at the distance – both geographical and metaphorical – Danny has traveled in a few short years. I believe your chambers would benefit greatly from his presence.

I recommend Danny Shokry to you without reservation. I hope these comments are helpful to you in considering his application. Please let me know if I can be of any further assistance.

Sincerely,

Lisa Heinzerling
Justice William J. Brennan, Jr. Professor of Law

Lisa Heinzerling - heinzerl@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to write this letter on behalf of Danny Shokry, Georgetown Law (expected 2024), who has applied to your chambers for a clerkship. I am an Associate Professor at Georgetown Law, where I teach and write in statutory and constitutional interpretation, torts, and empirical legal studies. I have taught hundreds of students, as an instructor at Oxford and Georgetown Law and as an assistant-in-instruction or teaching fellow at NYU Law, UCLA Law, and Yale Law. Among all of these impressive students, Danny stands out as an extremely impressive, promising, and well-rounded student. I offer the most enthusiastic support of his clerkship application to your chambers.

I first met Danny during a lunch program for “OutLaw,” Georgetown Law’s LGBTQIA+ law student association. OutLaw invites Georgetown Law professors to lunch with groups of students. Danny made a great impression from the start. He was one of the few students who submitted a thoughtful question in advance of the lunch program, and he was quick to follow the substantive part of my lunch talk, about statutory interpretation. At the lunch, he was friendly and professional.

Danny is pro-active. Shortly after the lunch event, he emailed me to ask whether I am recruiting RAs. I prefer to hire 2L and 3L students, but Danny had an impressive background, even among strong Georgetown Law students: His undergraduate grades are excellent, he worked as a science research assistant, and previously interned for a group of public defenders.

His interview confirmed my high expectations. Danny understood my projects immediately and asked insightful questions about the research. We had an impressively wide-ranging discussion about legal issues from Danny’s classes and the real world. In short, Danny stood out as a bright, eager, curious, and dedicated student. He was an easy choice to hire as an RA.

As an RA, Danny took on several big projects, and I was impressed by his ability to juggle so much. One of his projects involved reading a large number of Supreme Court opinions and “coding”/annotating them for various legal and linguistic properties. The project was coordinated between myself and a Georgetown Linguistics professor, with the primary goal of studying judicial use of “meta-language” (that is, language about other language, like “the meaning of the clause is...”). Several RAs were involved in the coding. Danny was a great coder. He worked quickly *and* accurately. Danny also helped me with a project related to “the reasonable reader.” Here too, Danny read a large number of Supreme Court opinions, distilling features of the “reasonable” and “ordinary” reader into an extremely clear and helpful spreadsheet.

Danny also took initiative. I was (too) busy during part of the time in which Danny was working, and Danny helped keep several of my projects run on time. Danny never overstepped his role, but he was admirably attentive to the project’s needs, helpfully moving into a leadership role and picking up (my) slack. Danny has a wonderful combination of hard and soft skills, including legal ability, acumen, and diligence. He would be an ideal member of any team, and I have no doubt he would flourish as a clerk.

Although I have not had Danny as a student in my class, I have reviewed his transcript and a writing sample. His 1L grades are very good. The Georgetown 1L curve is steep and consistent A- grades indicate strong performance. His 2L grades have taken an even further upward trajectory. Academically, Danny is a very impressive student.

Danny’s writing is also excellent. His research memos were clear, well-reasoned, and to the point. In writing this letter, I reviewed Danny’s legal memo for his legal practice course. That memo strikes me as very good legal writing.

Danny has clearly flourished academically, in his undergraduate work and throughout his time at Georgetown. He has also flourished in his extracurriculars, serving in leadership roles for OutLaw (LGBTQIA+ law students), the Middle Eastern North African Law Students Association, and the Georgetown Environmental Law Review.

He has also gained practical legal experience, as a judicial extern for Judge Christopher R. Cooper, U.S. District Court for the District of Columbia, and as a summer associate at Beck Redden. In discussing his work experiences with Danny, it was clear that Danny’s supervisors saw his ability. In some of these experiences, Danny was given significant responsibility and the employers’ feedback was enthusiastically positive.

Beyond Danny’s legal talent, work ethic, leadership ability, and writing skills, he is also a delightful person. Danny was well-liked and respected by his fellow research assistants. He is friendly and thoughtful. He is also a team-player, who is polite, articulate, thoughtful, professional, and modest. In every setting in which I’ve known Danny, he brings a positive outlook and collaborative spirit. He is also one of the most eager and curious students with whom I’ve worked. He would make for a wonderful clerk: I can easily imagine Danny diving into a broad range of legal work with excitement and dedication.

Kevin Tobia - kt744@georgetown.edu

In sum, Danny has the rare mix of legal intellect, diligence, collegiality, and an ability to work fast and get the details right. I predict that Danny would be an excellent law clerk, and I would be happy to discuss his experience further at any time. Thank you for considering his candidacy.

Sincerely,

Kevin Tobia, J.D., Ph.D. (Philosophy)
Associate Professor of Law

Kevin Tobia - kt744@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in strong support of Mr. Danny Shokry, who is applying for a clerkship in your chambers. I first got to know Danny when I taught him Constitutional Law I during his 1L autumn. We have continued to meet regularly as he has progressed through law school. He is a truly remarkable person, whose background has deeply shaped why he has gone into the law. He brings an important perspective that would be invaluable in chambers. He also is a stellar law student. I recommend him without reservation.

Danny's background is remarkable. He was seven years old when his family suddenly had to leave Cairo, Egypt to seek asylum in the United States. His family is Coptic, a Christian ethnoreligious group which faces severe persecution in Egypt. Although he had frequently heard derogatory remarks made to him and his family, and, because of bombings targeting Copts in Cairo, had been afraid when they went to Christmas and other days of worship, he was not aware at the time the extent to which his family had been targeted. He found out, years later, that his Grandmother had awakened to a bomb on her balcony. Danny's father, in turn, who was a Christian pastor and had travelled to different communities across Egypt, had been arrested and tortured because his teachings had been heard by a prominent government official's daughter. The family fled the country and arrived in the United States. Last year, for the first time, his father showed him his asylum "application" – a piece of paper his father had written in broken English, which recounted his experience and plead for refuge within America for his family.

When Danny first arrived in New York, he was overwhelmed. He did not speak much English and for the next six years was enrolled in ESL. In the meantime, it was through math that he found a connection to others – a common language that could give him a sense of belonging. Math provided a gateway then to science, prompting him in eighth grade to apply to the Science Institute – a specialized math and science school in New York. While he was there, he worked on his English skills in particular – leaning into his weaknesses to try to learn how better to communicate. About a year after he joined his high school mock trial team, the Supreme Court ruled in *Obergefell v. Hodges* – a case particularly influential for Danny at the time, in light of his understanding that he was gay, as well as his fear of telling his family, which is extremely religious.

These two experiences – the contrast between Egypt and the United States in his ability to practice his religion without fear of persecution, as well as the importance of the judicial system in protecting his rights and those of others like him – instilled in him a deep commitment to the rule of law.

When he entered Cornell, Danny found himself at a crossroads. While he still loved science, he wanted to explore more the side of oral advocacy. He joined Cornell's mock trial team, where he made it to nationals and placed in the top ten teams in the United States. He individually was ranked as the best participant in the country. His sophomore year, he joined the executive board for the mock trial team and proceeded to take a number of undergraduate law classes taught at the law school. He was work study in college, and he went on to balance his demanding academic schedule, neuroscience research, and working in the dining hall and later the cafes on campus. Despite the impact of COVID in his junior year, Danny worked with Cornell Defenders, a program that partnered with Cornell Law to provide undergraduate and law students an opportunity to work for Ithaca's public defenders.

At Georgetown Law, Danny's love of, and commitment to, the law is evident. He excelled in my course. Although ConLaw I is only 3 credits, the material I use in many ways reflects a 4-credit course. To help the students prepare for constructing and responding to originalist and purposive constitutional arguments, I begin with the Magna Carta and the beheading of Charles I before moving to the Glorious Revolution and the English Bill of Rights as precursors to the Virginia Declaration of Rights and the Declaration of Independence. The students then read the Articles of Confederation and look at where the framework failed, before considering the debates at the Constitutional Convention, the subsequent ratification of the U.S. Constitution by the states, and the adoption of the Bill of Rights.

At that point, the course begins to look more like a conventional ConLaw course, as we turn to *Marbury v. Madison*. We study separation of powers and federalism, with the discussion ranging from the 10th Amendment to sovereign immunity. Students consider the enumerated powers in Article I(8), with particular emphasis on tax and spend, the commerce clause, and the necessary and proper clause, before turning to Art. II, executive direction and control, and Art. I/Art. II war powers. We then look political question doctrine and the role of the courts. At the end, the course returns to the question of whether the structure was sufficient to safeguard rights, with emphasis on the First Amendment.

In brief, the students have to absorb a tremendous amount of material and gain breadth and depth.

Mr. Shokry came every day, prepared, and was willing to take on arguments with which he both agreed and disagreed, to probe

Laura Donohue - lkdonohue@law.georgetown.edu

the strengths and weaknesses of precedential, purposive, historical, textualist, structuralist, and policy-based arguments. I could call all students every class and encourage debate, tracking their participation. In 23 classes, he participated in the debate approximately 40 times – he also came to about a quarter of my office hours during the term, to ensure that he understood the materials.

Danny earned an A on the final – one of only a few students in the class to do so. My class is far from the only place where he has excelled. He currently maintains a 3.75 GPA at Georgetown Law.

Danny went on to tutor students in my ConLaw I class this year, as part of the support provided to students in the RISE program, which is designed to help students who come from non-traditional backgrounds – such as first generation college students and ethnic or racial minorities.

Danny has assumed numerous leadership roles at Georgetown Law. He is the Secretary of OutLaw, the Treasurer of the Middle Eastern North African Law Students Association, and both a Staff Editor and Executive Editor of the *Georgetown Environmental Law Review*.

The reason Danny wants to clerk is to continue to hone his research and writing skills and to learn as much as he can about the judicial process to help him to become an in-court advocate. He is eager to see many different types of approaches to advocacy in the courtroom. And he is keen to learn more about how judges approach the law.

As an immigrant from a low socioeconomic background, Danny would benefit tremendously from the mentorship that is part of the clerkship opportunity.

Danny's experiences in life, and the ways he has risen to meet the challenges he has faced, are remarkable. His legal abilities are extremely strong. He is also humble, kind, and just a lovely person. He would be a joy to have as part of a clerkship cohort. I recommend him without reservation.

Please feel free to reach out to me at 202-531-4433 if you have any further questions about his candidacy.

Yours sincerely,

Laura K. Donohue, J.D., Ph.D. (Cantab.)
Scott K. Ginsburg Professor of Law and
National Security Professor of Law

Laura Donohue - lkdonohue@law.georgetown.edu

Danny Shokry
46 Oak Lane
Staten Island, NY 10312
dsl768@georgetown.edu | (347) 612-5549

June 12, 2023

The attached writing sample is a bench memorandum that I drafted as an assignment when I was a judicial intern at the United States District Court for the District of Columbia in Judge Christopher R. Cooper's chambers. The assignment was to read through the factual record, identify the issues, conduct research, and give guidance on how the Court should rule in a FOIA case where the Plaintiff believes the parties had reached a valid settlement agreement, but the Defendant did not. I performed all the research and writing myself. Although I received verbal feedback from a senior writing fellow at Georgetown University Law Center's Writing Center, this writing sample is substantially my writing.

All identifying facts and names have been redacted for confidentiality purposes. I am submitting the attached writing sample with the permission of Judge Cooper's chambers.

Statement of the Issue Presented for Review

Did the parties reach a valid, enforceable settlement agreement where defense counsel, a DOJ employee, had authorization from the Government Agency, but not from DOJ supervisors, and only Plaintiff signed the agreement?

Conclusion

The parties likely did not have a valid settlement agreement. First, the Defense did not express the requisite intent to be bound by the agreement. The agreement's express terms required both parties' signatures to be binding. The Defendant never signed the agreement, and therefore, it was not binding.

Second, defense counsel lacked the authority to bind the federal government to the settlement agreement. Defense counsel's representations that Defendant was willing to accept to accept the settle agreement do not bind the government because apparent authority is inapplicable against the federal government. In addition, as an AUSA, defense counsel did not have sufficient authority on his own. Defense counsel also did not have actual authority from DOJ supervisors as is required by DOJ policies. Similarly, the Government Agency's authorization was insufficient because authority to accept settlement agreements rests with the DOJ, not the Government Agency.

Statement of the Case

I. Factual Background

Plaintiff Environmental Group is a nonprofit based out of a Western state. Compl. ¶ XX. On [date], Plaintiff submitted a written request to Defendant seeking records regarding a land exchange. Compl. ¶ XX. Defendant is the federal agency that maintains the land exchange records that Plaintiff was seeking. Compl. ¶ XX. Plaintiff's request was denied by Defendant without any formal determination or advising Plaintiff of appeal rights. Compl. ¶ XX. Defendant did not consider the [date] request a proper FOIA request. Ans. ¶ XX; ECF XX at XX.

a. [Date] FOIA Request

On [date], Plaintiff submitted a FOIA request for the land exchange records. Compl. ¶ XX. On [date], Defendant confirmed it had received the FOIA request. Compl. ¶ XX. On [date], Defendant provided its first interim response in the form of records released in full. Compl. ¶ XX. On [date], Defendant informed Plaintiff it had identified additional relevant pages and was going to release approximately half, claiming FOIA Exemptions 3, 5, and 6 for the rest. Compl. ¶ XX; ECF XX at X.

On [date], Plaintiff reached out to Defendant's employee seeking a specific record. Compl. ¶ XX. Defendant's employee informed Plaintiff that she did not have nor will she receive the records Plaintiff was seeking, and that Defendant would only receive an analyzed version of the record ("TARP"). Compl. ¶ XX. Defendant's employee also told Plaintiff that she had not sent them the TARP for the land exchange in the first response, despite having received it on [date]. Compl. ¶¶ XX-XX

b. [Date] FOIA Request

On [date],¹ Plaintiff sent an email to Defendant's employee seeking the TARP. Compl. ¶ XX. On [date], Plaintiff received a letter from Defendant's FOIA office stating that Defendant had considered the email as a second FOIA request and confirmed receiving it. Compl. ¶ XX. Defendant also provided an entirely redacted copy of the TARP and claimed FOIA Exemption 5. Compl. ¶ XX. On [date], Plaintiff requested an unredacted version. Compl. ¶ XX. Approximately two weeks later, Defendant rejected Plaintiff's request based on FOIA Exemption 5 and informed Plaintiff on its right to appeal. Compl. ¶ XX.

The deadline to respond to this FOIA request was [date].² Compl. ¶ XX.

c. [Date] FOIA Request

On [date], Plaintiff submitted another FOIA request seeking the actual record that the TARP analyzed. Compl. ¶ XX. On [date], Defendant confirmed it had received the FOIA request, identified relevant records, but was withholding them under FOIA Exemptions 5 and 6. Compl. ¶ XX.

¹ Date typo. Actual text says "[Date]"

² It is unclear why this was included in the complaint since the agency responded by [date].

d. [Date] Appeal for the [date] and [date] FOIA Requests

On [date], Plaintiff submitted an administrative appeal for its [date] and [date] FOIA requests. Compl. ¶ XX. On [date], Defendant confirmed receiving the appeal. Compl. ¶ XX. Defendant claims that this appeal did not include the [date] FOIA request, and even if it did, the deadline to appeal that FOIA was [date], and therefore it was too late. Ans. ¶ XX; ECF XX at X.

On [date], the statutory deadline for Defendant's response to the appeal had passed. Compl. ¶ XX. On [date] and [date], Plaintiff inquired into the status of their appeal, which was still processing. Compl. ¶ XX-XX. On [date], Defendant had finished its review of the appeal, releasing some of the previously withheld records and withholding others under Exemptions 5 and 6. Compl. ¶ XX.

e. [Date] Appeal for the [date]FOIA Request

On [date], Defendant filed an appeal for the [date] FOIA request. Compl. ¶ XX. On [date], Defendant had confirmed it was processing this appeal. Compl. ¶ XX. Plaintiff has not yet received a final determination of this appeal. Compl. ¶ XX. On [date], Defendant released over 1,000 pages and withheld fifty pages under Exemptions 5 and 6 in response to both appeals. ECF XX at X.

II. Procedural Posture

Plaintiff filed a complaint on [date]. Compl. at XX. Defendant filed an answer on [date], asserting three defenses: Plaintiff failed to exhaust administrative remedies by failing to file a timely appeal, Defendant complied with FOIA's requirements, and Defendant did not have to produce all the records as they properly fell within FOIA exemptions. Ans. at XX-XX. On [date], Defendant filed a motion for summary judgment asserting the defenses identified in the answer. ECF XX.

On [date], Plaintiff reached out to Defendant to negotiate a settlement agreement. ECF XX at X. Plaintiff and Defendant negotiated in good faith for over three months. ECF XX at X-X; ECF XX at X. Plaintiff, with Defendant's consent, requested extending its deadline to respond to Plaintiff's summary judgment motion three times. ECF XX at X. The Court extended the deadline to [date] and encouraged both parties to finalize the settlement agreement within 30

days. ECF XX at X. The Court also said that if no settlement is reached within 30 days, then deadlines for the summary judgment briefing would be due. ECF XX at X-X.

On [date], defense counsel represented to Plaintiff that the Government Agency had approved the terms of the settlement agreement. ECF XX at X; ECF XX-XX at X. The parties continued to make procedural and non-substantive edits to the settlement agreement. ECF XX at X. On [date], defense counsel represented to Plaintiff that his supervisor had approved the settlement agreement, pending one change. ECF XX-X at X. The same day, Plaintiff consented to the change and signed the settlement agreement. ECF XX-X at X. Defense counsel, however, never signed the settlement agreement. ECF XX at XX. The settlement agreement would have fully resolved Plaintiff's claims, leaving only attorney's fees to be decided on later. ECF XX at X.

Later that day, defense counsel called Plaintiff and informed Plaintiff that Defense's supervisor required changes be made. ECF XX at XX. The parties attempted to assuage the supervisor's requirements to no avail. ECF XX at XX. Two days later, defense counsel relayed that their supervisor required the settlement agreement to be rewritten and raised other substantive edits to Plaintiff. ECF XX-X at X.

On [date], the Court held a status conference between the two parties, but no agreement was reached. ECF XX at XX. The parties agreed to convene four days later. ECF XX at XX. However, later that same day, defense counsel told Plaintiff that the proposal was withdrawn, and Plaintiff should file its motion. ECF XX-X at X. The Plaintiff filed a motion seeking to enforce the [date] settlement agreement. ECF XX at X. Defendant filed a motion opposing the enforcement and Plaintiff filed another motion in response. ECF XX-XX.

Legal Standard

"It is well established that federal district courts have the authority to enforce settlement agreements entered into by litigants in cases pending before them." Samra v. Shaheen Bus. and Inv. Group, Inc., 355 F. Supp. 2d 483, 493 (D.D.C. 2005) (citing Autera v. Robinson, 419 F.2d 1197, 1200 (D.C. Cir. 1969)). The party moving to enforce a settlement agreement bears the burden of proving that the parties formed a binding agreement by clear and convincing evidence. Blackstone v. Brink, 63 F.Supp.3d 68, 76 (D.D.C. 2014). If there is a genuine dispute "about

whether the parties have entered into a binding settlement, the district court must hold an evidentiary hearing that includes the opportunity for cross-examination.” Samra, 355 F. Supp. 2d at 493 (quoting United States v. Mahoney, 247 F.3d 279, 285 (D.C. Cir. 2001)). The hearing’s purpose is to allow the court to make credibility determinations and allow factual issues to be adequately explored. Id. (citing Autera, 419 F.2d at 1202).

“[W]hether parties have reached a valid settlement is a question of contract law.” Id. at 494 (citing Mahoney, 247 F.3d at 285). Contract formation is controlled by the law of the state. Makins v. District of Columbia, 277 F.3d 544, 547-48 (D.C. Cir. 2002). Plaintiff contends that D.C. law controls here, ECF XX at XX, and Defendant not contest Plaintiff and cites D.C. law. ECF XX at XX; ECF XX at X.

Argument

I. The Parties Likely Did Not Enter Into an Enforceable Agreement

Under D.C. law, an enforceable contract exists when (1) there is an agreement to all the material terms, (2) both parties express an intent to be bound, and (3) parties have the authority to enter into a contract. Makins, 277 F.3d at 547-48. Defendant that there was an agreement to all the material terms,³ but contests an expression of an intent to be bound and authority to enter into a binding argument. ECF XX. The parties likely did not express an intent to be bound and defense counsel likely lacked the authority to enter into the settlement agreement, and therefore, an enforceable contract does not exist.

a. Defendant Likely Did Not Express an Intent to Be Bound by the Settlement Agreement

Defendant likely did not express an intent to be bound by the settlement agreement. Neither party contests Plaintiff’s expression of its intent. Thus, only Defendant’s intent is at issue. Courts can examine the written agreement itself to determine if there was an intent to be bound. Ekedahl v. CORESTAFF, Inc., 183 F.3d 855, 858 (D.C. Cir. 1999) (applying D.C. law).

³ Plaintiff argues that since there was a “final version” ready to be signed, the parties had an agreement to all the terms contained therein. ECF XX at XX. Plaintiff argues that the agreement would have set forth the terms and conditions of the parties’ compromise to the FOIA searches conducted by Defendant, the FOIA exemptions applicability, and Defendant’s policies. ECF XX at XX-XX. Plaintiff argues that these compromises were bargained for by the parties, and thus are legally sufficient consideration. ECF XX at XX.

Id. Although a signature is the clearest evidence of an intent to be bound, it is not essential. Hood v. District of Columbia, 211 F. Supp. 2d 176, 180 (D.D.C. 2002) (applying D.C. law). However, an agreement’s terms may require a signature to bind the parties. Carter v. Bank of Am., 845 F. Supp. 2d 140, 144-45 (D.D.C. 2012) (applying D.C. law) (“no contract will be formed unless and until defendants sign the Loan Modification Agreement.”); see also Osseiran v. Int’l Fin. Corp., No. 06-336, 2010 WL 11636217, at *3 (D.D.C. June 28, 2010) (applying D.C. law) (“only the document as executed by [the parties] will contain the terms that bind them. Until the document is executed by [the parties], neither [party] intends to be bound.”); see also Whittaker v. United States, No. 19-199, 2021 WL 2913626, at *8 (D.D.C. July 12, 2021) (applying D.C. law) (finding that where the agreement’s terms did not require execution, an agreement was still binding despite a lack of a signature.).

Paragraph X of the [date] agreement stated “[t]he parties also agree that this agreement may be executed in counterparts and is *effective on the date by which both parties have executed this agreement.*” ECF XX-X at X (emphasis added). The proposed settlement agreement unambiguously required the parties to do more than just agree to the agreement’s terms – it required execution. The only way that the agreement contemplates execution is through signing the agreement, and it was never signed. ECF XX-X at X. Because the agreement was never signed, it was never executed, and therefore, no enforceable contract exists.

Plaintiff may argue that defense counsel’s conduct can show that the parties had agreed to all the terms contained within the [date] settlement and were “merely awaiting ‘memorialization of their agreement in a more formal document.’” United House of Prayer for All People v. Therrien Waddell, Inc., 112 A.3d 330, 342 (D.C. 2015) (citing Vacold LLC v. Cerami, 545 F.3d 114, 123 (2d Cir. 2008)). Defense counsel had told Plaintiff that he required supervisory approval on multiple occasions, had acquired supervisory approval, pending one change, and would send it over to the Court once Plaintiff signed . ECF XX-X at X; ECF XX-X at X; ECF XX-XX at X-X; ECF XX-X at X. The court can inquire into the parties’ action at the time of contract formation only if the written settlement agreement is ambiguous.⁴ Given the plain and

⁴ Ambiguity or plain meaning of the contract are questions of law. Segar v. Mukasey, 508 F.3d 16, 22 (D.C. Cir. 2007). Therefore, determination of the ambiguity or plain meaning does not require a hearing. See Samra, 355 F. Supp. 2d at 493.

unambiguous language of the settlement agreement, the court should not consider the party's conduct.

b. Defense Counsel Likely Lacked the Authority to Bind Defendant to the Settlement Agreement

Defense counsel likely could not have bound Defendant to the settlement agreement because he lacked the authority to bind the federal government. An agent may bind his principal only if he has actual or apparent authority. Makins v. District of Columbia, 861 A.2d 590, 593 (D.C. 2004). Because there was no actual or apparent authority, the settlement agreement was likely made without authority to bind the Defendant. Id.

i. Apparent authority does not apply against the government.

Apparent authority exists when a third party believes that an agent has authority to bind the principal. Id. at 594 (citing Sigal Construction Corp. v. Stanbury, 586 A.2d 1204, 1219 (D.C. 1991)). Apparent authority, however, does not apply against the government. E.g., Fed. Crop Ins. v. Merrill, 332 U.S. 380, 384 (1947) (“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority.”); Perkins v. District of Columbia, 146 A.3d 80, 85 (D.C. 2016). Defense counsel incorrectly relies on Burton v. Adm’r, Gen. Serv. Admin. to prove that apparent authority applies here. In Burton, the AUSA reached a settlement agreement with Burton after receiving the USFS’s blessing. Burton, No. 89-2338, 1992 WL 300970, *4 (D.D.C. July 10, 1992). The court held that the “[AUSA]’s reliance on the representations of agency counsel as to the agency’s position” are not unreasonable and that the “[AUSA] cannot have been expected to second-guess [agency employee]’s assurances that the agency agreed with the settlement terms [the AUSA] offered to plaintiff.” Id. (emphasis added). Burton speaks to representations made by the the represented agency to the AUSA and the AUSA’s reliance on such representations, not representations made by an AUSA or DOJ employee. Id. Here, however, Plaintiff maintains apparent authority for statements made by defense counsel to Plaintiff. ECF XX at XX-XX. Thus, Burton is inapplicable and apparent authority

Plaintiff also argues that even if there is a general exception, Defendant has not shown that it does not apply to FOIA defendants who agree to a non-monetary settlement. However, the Supreme Court in Fed. Crop. Ins. extremely broad language's cuts against Defendant's claim: "*Whatever* the form in which the Government functions, *anyone* entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." 332 U.S. at 384 (emphasis added). Therefore, apparent authority is insufficient to render the settlement agreement valid.⁵

ii. Defense counsel likely did not have actual authority because he did not have supervisory approval to agree to the settlement agreement and the Government Agency's approval is insufficient.

Plaintiff claims that defense counsel had actual authority since he was authorized by the Government Agency and by DOJ supervisors to accept the settlement agreement. ECF XX at X. Defendant does not contest that defense counsel had authorization from the Government Agency but argues that defense counsel was never authorized to accept the settlement by DOJ supervisors, and therefore, the agreement is not binding.⁶ ECF XX at X.

Defense counsel himself knew and clearly represented to Plaintiff that he did not have the authority to enter into a settlement agreement purely on his own authority. ECF XX-X at XX, X, XX; see [Supervisor 1] Decl. ¶ X. Courts often look to statutes, regulations, rules, or policies to determine authority. Burton, 1992 WL 300970, at *4 (looking to internal policy, but finding that it was not controlling because it was not written); Perkins, 146 A.3d at 85; see also Davis & Assoc., Inc. v. District of Columbia, 501 F. Supp. 2d 77, 81 (D.D.C. 2007) (applying D.C. law); see also Bank of Am., N.A. v. District of Columbia, 80 A.3d 650, 670 (D.C. 2013). DOJ had a written guideline that requires a supervisor approving a settlement agreement to submit a referral memorandum. U.S. Dep't of Just., Just. Manual § 4-3.320; [Supervisor 2] Decl. ¶ X; [Supervisor 1] Decl. ¶ X. Defense counsel's supervisor stated that she never approved the settlement, citing her lack of compliance with § 4-3.320 as evidence. [Supervisor 2] Decl. ¶ X-X. The failure to comply with department guidelines likely means that defense counsel's supervisors did not

⁵ Defendant also claims that even if apparent authority did apply against the government, Plaintiff has not met the requirement of a showing of detrimental reliance. The Court does not need to reach the merits of this argument because apparent authority does not apply against the federal government.

⁶ Defendant also argues that Plaintiff has failed to raise actual authority in its opening brief, and therefore, forfeits this argument. ECF XX at X n.X (citing Al-Tamimi v. Adelson, 916 F.3d 1, 6 (D.C. Cir. 2019)).

confer proper authority to accept the settlement agreement, nor did she attempt to do so. [Supervisor 2] Decl. ¶ X (“I conveyed that I approved the general idea of settling as to liability now and attorney’s fees and costs later, so that the parties could resolve liability issues before the filing deadline. I did not, however, approve the specific draft agreement that [defense counsel] had attached to the email. Later that same day, after having reviewed the attached settlement agreement, I had numerous concerns with it and told [defense counsel] that it needed substantial revision and that I did not authorize him to execute it.”).⁷ Thus, defense counsel likely lacked authorization to accept the settlement agreement by his supervisor.

Government Agency’s authorization is also likely insufficient. DOJ has “plenary power” in settling cases. See Burton, 1992 WL 300970, at *3 (citing 5 U.S.C. § 901 (“As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.”)). While “a client’s right to accept or reject a settlement offer is absolute,” by referring the case to DOJ, the Government Agency has transferred its settlement authority to DOJ. See In re Hager, 812 A.2d 904, 919 (D.C. 2002); cf. Vill. of Kaktovik v. Watt, 689 F.2d 222, 234-35 n.13 (D.C. Cir. 1982) (Greene, H., concurring) (“The Department of Justice has consistently referred to the Department of the Interior as its ‘client’ ... the Justice Department’s client is the United States.”). Therefore, the Government Agency’s authorization is likely insufficient to give defense counsel actual authority to accept the settlement agreement.

⁷ Plaintiff does not seem to be contesting these facts, perhaps due to a lack of access. ECF XX at X. However, if a factual dispute does arise, a hearing with opportunity for cross examination is required. Samra, 355 F. Supp. 2d at 493.

Applicant Details

First Name	Gabriel
Last Name	Siegel
Citizenship Status	U. S. Citizen
Email Address	gas2161@columbia.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>415 W 120th Street, Apartment 9E</div> <div>City</div> <div>New York</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>10027</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	9145743147

Applicant Education

BA/BS From	Wesleyan University
Date of BA/BS	May 2021
JD/LLB From	Columbia University School of Law
	http://www.law.columbia.edu
Date of JD/LLB	May 22, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Law and Social Problems
Moot Court Experience	Yes
Moot Court Name(s)	Harlan Fiske Stone Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships Yes

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Shanahan, Colleen
colleen.shanahan@columbia.edu

Pozen, David
dpozen@law.columbia.edu
2128540438

Mitchell, Lowenthal
mlowenthal@cgsh.com
1_646_641-2948

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year student at Columbia Law School. I write to apply for a clerkship in your chambers following my graduation in 2024. Philadelphia is an energizing city and epicenter of compelling, salient litigation, and I find the prospect of beginning my legal career clerking in your chambers particularly appealing.

I am uniquely qualified for this position. As a judicial intern for Judge Edgardo Ramos, I aided in drafting eight opinions that were ultimately published. I became a stronger writer and researcher in Judge Ramos's chambers. The experience taught me that good writing combs through legal ambiguity, takes each detail into account, and comes to a concise conclusion. I have brought this focus on clarity and precision to my other experiences at Columbia, such as my role as a research assistant for Professor Colleen Shanahan and my work on the *Journal of Law and Social Problems*. Last, I aim to be a litigator in New York. Clerking in your chambers would expose me to the work that I will be doing in practice and give me a unique skillset and point of view.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professor David Pozen ((212) 854 - 0438, dpozen@law.columbia.edu), Professor Colleen Shanahan ((212) 854 - 8030, colleen.shanahan@law.columbia.edu), and Professor Mitchell Lowenthal (mloenthal@law.columbia.edu).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Gabriel Siegel

GABRIEL (GABE) SIEGEL

415 West 120th Street, Apt. 9E, New York, NY 10027 • (914) 574-3147 • gas2161@columbia.edu

EDUCATION

Columbia Law School, New York, NY

J.D. expected May 2024

Honors: Harlan Fiske Stone Scholar (2021–22, 2022–23)

Activities: Columbia American Constitution Society, Vice President of Development

Journal of Law and Social Problems, Online Publications Editor

Admissions Student Ambassador

OutLaws

Research Assistant, Professor Colleen Shanahan

Wesleyan University, Middletown, CT

B.A., American Government, received May 2021

Honors: Phi Beta Kappa

Dean's List (Fall 2017 – Spring 2021)

Activities: Wesleyan Democrats, President

Spoon University (Wesleyan food publication), Photo Director

Wesleyan Orchestra, First Violinist

Tour Guide

EXPERIENCE

DEBEVOISE & PLIMPTON, New York, NY

Summer Associate

Summer 2023

Work on substantive legal matters in multiple departments, including litigation and pro bono projects.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, New York, NY

Judicial Intern to the Hon. Edgardo Ramos

Summer 2022

Researched and drafted opinions on a variety of substantive and procedural issues. Opinions included criminal law matters such as a *Fatico* hearing; civil rights matters such as a Title VII dispute; and civil procedure matters such as a motion to amend to substitute a party.

WARBY PARKER, Greenwich, CT

Sales Advisor

Summer 2021

Advised customers regarding which style of glasses to choose. Learned basic opticianry skills to effectively meet customers' needs. Earned title of "top seller" several times.

MERCURY PUBLIC AFFAIRS, Washington, DC

Junior Associate

Summer 2020

Compiled press briefings for staff and clients. Briefed congressional hearings. Spearheaded collaborative research projects and completed independent research. Tracked and analyzed legislation for clients.

WESTCHESTER COUNTY DISTRICT ATTORNEY'S OFFICE, White Plains, NY

Intern, Investigations Division

Summer 2019

Drafted legal memoranda. Aided in witness interviews and transcribed video evidence. Observed criminal proceedings and briefed lawyers unable to attend. Participated in two mock trials and led a mock trial team.

PACE WOMEN'S JUSTICE CENTER, White Plains, NY

Intern

Summer 2018

Assisted attorneys in court by filing documents and helping clients through the courthouse for matters including orders of protection and both contested and uncontested divorces. Drafted internal legal memoranda and outlined a will for use in family law proceedings.

LANGUAGE SKILLS: French (fluent), Italian (basic)

INTERESTS: Violinist, bread baking, abstract expressionist art, contemporary fashion



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CLS TRANSCRIPT (Unofficial)

06/07/2023 18:46:08

Program: Juris Doctor

Gabriel Asher Siegel

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Talley, Eric	4.0	A
L6169-2	Legislation and Regulation	Briffault, Richard	4.0	A-
L9175-1	S. Trial Practice	Dassin, Lev; Horowitz, Jeffrey; Seibel, Cathy	2.0	A-
L6683-1	Supervised Research Paper	Shanahan, Colleen F.	3.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	A-
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6675-1	Major Writing Credit	Shanahan, Colleen F.	0.0	CR
L6672-1	Minor Writing Credit	Bernhardt, Sophia	0.0	CR
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR
L9225-1	S. Complex Litigation	Liman, Lewis; Lowenthal, Mitchell	2.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Shanahan, Colleen F.	2.0	CR
L6683-1	Supervised Research Paper	Shanahan, Colleen F.	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-2	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A
L6121-32	Legal Practice Workshop II	Lebovits, Gerald	1.0	HP
L6116-2	Property	Purdy, Jedediah S.	4.0	B+
L6118-1	Torts	Huang, Bert	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Page 1 of 2

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-3	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Sturm, Susan P.	4.0	B+
L6133-6	Constitutional Law	Pozen, David	4.0	A
L6105-8	Contracts	Kraus, Jody	4.0	B
L6113-3	Legal Methods	Harcourt, Bernard E.	1.0	CR
L6115-32	Legal Practice Workshop I	Lebovits, Gerald; Newman, Mariana	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 57.0

Total Earned JD Program Points: 57.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	2L
2021-22	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	12.0

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Gabriel Seigel as a clerk in your chambers. Gabe has served as my re-search assistant and I was his note advisor this year. In both of these roles, I have seen Gabe's re-search and writing regarding my own research interests and his particular interest in judicial decision making. He is a rigorous thinker, an organized and diligent researcher, and a precise writer. He would make a terrific clerk.

As a research assistant for the duration of his second year of law school, Gabe has been a reliably excellent colleague supporting my work regarding law development in lawyerless courts. This Fall, he researched and analyzed legal and social science literature regarding law development outside the United States. Gabe's work was precise, thorough, timely, and insightful. He was able to master multiple sources across disciplines and jurisdictions, succinctly summarize their relevance in writing and verbally, and usefully analyze how they might apply to lawyerless courts in the United States (i.e. state civil courts where most litigants are unrepresented). His work provided essential context for an initial article on this topic, and his editing and bluebooking assistance on the ultimate article was flawless.

This Spring, Gabe's work was less traditionally academic and required facility with litigation practice and court records, an area in which Gabe shines. I am in the midst of a book project that tells the story of America's Lawyerless Courts for a non-academic audience and asked Gabe to help gather stories of litigants in housing, family, and debt collection courts. In particular, I asked Gabe to identify federal class actions or other civil suits regarding such litigants, so that we could mine the pleadings to tell these stories. For example, the record in *Turner v. Rogers*, 564 U.S. 431 (2011), tells a nuanced story about unrepresented litigants in family court. Gabe was remarkably resourceful and creative in his research. Focused on the Second Circuit and its district courts, he analyzed opinions and uncovered a number of cases with promising facts, and then went so far as to go to various courthouses to pull old case files to identify the most robust factual records. It is unusual for a law student to have such facility with research beyond electronic databases and even more unusual for them to engage so thoroughly in the complexity of factual records. Gabe's help has been indispensable on this front.

Finally, I was the faculty advisor for Gabe's note, which is an empirical examination of judicial educational background and decision making in SEC Rule 10b-5 cases. From the outset of this project, Gabe impressed me with his thoughtfulness about shaping his research project. He knew he was interested in judicial decision making, having engaged this topic as an undergraduate. (Where, I might mention, he studied with my political scientist co-author, who highly recommended Gabe up-on his decision to attend Columbia Law). Gabe also knew he wanted to do some empirical analysis, as he had not been able to use these analytic skills in law school thus far. And he was interested in exploring securities law as a subject matter. With those three substantive goals, Gabe invested huge effort in building his own analytic capacity while contributing to research in each of these areas. He gathered original data on over one hundred securities cases, he developed his own statistical expertise by using analytic approaches in STATA that he had not used before, and he sharpened his understanding of existing literature regarding decision making and judicial characteristics. In hindsight, the note was remarkably ambitious. What's more, Gabe's writing improved with each draft and Gabe's enthusiasm for and dedication to refining his writing was striking.

Taken together, my experiences with Gabe show him to be someone who is intentionally ambitious in his work, experienced and rigorous in his research, methodical and precise in his writing. He is also someone who takes responsibility for his work, anticipating problems and potential solutions of his own accord, and actively communicating along the way. In sum, he's just the kind of law student I feel very confident in as a future lawyer and as a clerk who contributes to the work and community of chambers.

I highly recommend Gabe for a clerkship position and would be happy to speak more about him. If you would like to speak more about Gabe, you are welcome to call my mobile phone: 917-553-6752.

Sincerely,

Colleen F. Shanahan
Clinical Professor of Law

Colleen Shanahan - colleen.shanahan@columbia.edu

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Gabriel Siegel

Dear Judge Sanchez:

It is my pleasure to recommend Columbia Law School rising 3L Gabriel Siegel for a clerkship in your chambers. Gabe is one of the stars of his class and promises to be a terrific clerk.

Gabe was one of 40 students assigned to my Constitutional Law “small group” in the fall of 2021, his first semester of law school. In an unusually strong group of students, and under unusually trying Covid conditions, Gabe performed brilliantly. His class comments were incisive and informed; his class preparation was immaculate; and his questions and reflections during office hours were on another level. I remember, in particular, a nuanced defense of *Bostock*’s outcome, but not its reasoning, that he advanced during one session. Gabe’s final exam did not disappoint, earning the second highest score in the class. In a typical year, that exam would have been first and led to the coveted Best in Class Award, which cannot be shared under Columbia’s rules.

Gabe has made his mark at the law school since that first semester. Reflecting his passion for constitutional law as well as his commitment to progressive politics, Gabe has been a leader of the American Constitution Society’s student chapter. Our ACS chapter is not always the most active, to put it diplomatically, but with Gabe at the helm it put on a more robust series of events than I can remember it doing in the past. Gabe has also been an active member of OutLaws, a research assistant to Professor Colleen Shanahan, and an editor on the Columbia Journal of Law & Social Problems, for which he has written an ingenious note about whether and how judges’ educational backgrounds might influence how they approach securities fraud cases. While I do not have Gabe’s spring 2023 grades in front of me at this writing, he earned only A-range grades during the fall of his 2L year. Last summer, Gabe was a judicial intern for Judge Edgardo Ramos on the U.S. District Court for the Southern District of New York. To say that Gabe enjoyed the job would be an understatement; he raves about the experience and the legal research and writing opportunities it afforded.

Many students for whom I write clerkship letters have been my RA, TA, or note supervise, which allows me to go into greater depth about my personal working relationship with them. I have not had such a working relationship with Gabe—I would have hired him as an RA in a heartbeat this past fall if he had not already committed to Professor Shanahan—and there is therefore a risk that this letter will come across as less than fully enthusiastic. I want to stress that this is not the case. From every last thing I have seen of, read by, and heard about Gabe, I feel nothing but enthusiasm for Gabe and his potential.

In short, Gabe was a superstar in Constitutional Law, has helped reenergize ACS at Columbia, and is without doubt one of the sharpest students and strongest writers in his class. He is idealistic, insightful, and overflowing with intellectual curiosity and positive energy. And he already knows that he loves the job of a law clerk. I urge you to give him a close look.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

David Pozen

David Pozen - dpozen@law.columbia.edu - 2128540438

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Re: Gabriel Siegel

Mr. Siegel was an outstanding student in a Complex Litigation seminar Judge Lewis Liman and I taught at Columbia Law School in the Fall of 2022, and I enthusiastically recommend Gabe for a judicial clerkship.

I am a Senior Counsel at Cleary Gottlieb Steen & Hamilton LLP, where I practiced for over 30 years after serving as a law clerk to the Hon. Edward Weinfeld. Judge Liman and I practiced together at Cleary Gottlieb and we designed the seminar to cover the procedural aspects of our practice. The course consisted of a broad array of the settings that animate complex litigation matters, including several sessions on class actions (including personal jurisdiction and venue issues, discovery, class certification, settlements, objections, and attorneys' fees); consolidation and coordination of cases within and among judicial systems; aggregation of cases, including through the MDL process; preemption issues; shareholder derivative actions; problems when there are parallel private and public actions; and the procedural law applicable in state courts when they adjudicate federal claims, a topic which has come to be called "reverse-Erie."

There were approximately 20 students in the seminar. Mr. Siegel's performance was at the top of the class.

Gabe was an active seminar participant. He regularly demonstrated not only that he had read the assigned materials, but had thought them through. In addition to being able to synthesize the issues the readings presented, he was able to argue points from them, and held his own even when the points he was making were seemingly inconsistent with the views Judge Liman or I may have appeared to be advocating. In one instance, for example, he ably defended a reading of a Second Circuit case which embraced so-called "issue classes" under Rule 23(c)(4), even though the tenor of the argument I was making challenged the Circuit's analysis. His contributions to class were frequent, helpful, insightful, and most welcome.

So were his writings. We required two types of written submissions. First, students were divided into three groups, and every third week each group member was required to submit a short paper describing what the student had found interesting, or troubling, about the assigned readings for that class. In these writings, seminar participants raised points that Judge Liman and I used to weave into the class discussion. Mr. Siegel's papers generally ably described the readings and made arguments the readings inspired. His arguments were both enjoyable to read and thought-provoking.

Second, the final exam was in the form of a 10 page paper. Students were given the option of answering 4 questions based on one of two hypothetical fact patterns. Judge Liman and I both agreed that Mr. Siegel's final paper was one of the very strongest we received. It not only showed a thorough reading and mastery of the materials, but it also made impressive, interesting and clever arguments.

Finally, on a personal level, Gabe was a pleasure to meet and get to know. He was unfailingly polite and courteous in class, respectful when others were speaking, thoughtful about what others had said, and showed an enthusiasm for the subject matter.

Based upon his performance in the seminar, I am confident that Mr. Siegel would be an enthusiastic and dedicated law clerk, one who will read carefully papers submitted by the parties, give careful consideration to their arguments, focus narrowly on the issues at hand, effectively advocate for the position he thinks correct, and readily accept and effectively implement the ultimate judgment of the Court. In addition, he has already had clerkship-type experience, having interned last summer with Judge Edgardo Ramos. Finally, Judge Liman and I constructed the seminar in a trans-substantive way, so the course would be particularly relevant to a judicial clerk: as the description of the syllabus indicates, during the course of the semester we covered subjects that would be relevant to the type of matters that commonly come before the Court -- both commercial disputes, such as securities and employment-related class actions, as well as public interest law matters, such as Section 1983 damages actions and litigation directed at the reform of institutions, such as jails and schools.

For all these reasons, I enthusiastically, and without reservation, recommend Gabe Siegel for a judicial clerkship.

Very truly yours,

Mitchell A. Lowenthal

Lowenthal Mitchell - mlowenthal@cgsh.com - 1 _646_ 641-2948

T14 and 10b-5: How Educational Background Affects Judicial Decisionmaking in 10b-5 Securities Fraud Cases

EXPLANATION OF WRITING SAMPLE

Below is an abbreviated version of my student Note. The Note asked whether there was a connection between a judge's legal education and the decisions they make in 10b-5 securities fraud cases, continuing a long line of literature querying the relationship between judge background and judicial decisionmaking. It ultimately found no correlation. I have included the introduction, literature review, and portions of the results and discussion section. I am happy to provide the Note in its complete state if preferred.

Introduction

When Congress confirmed now-Justice Ketanji Brown Jackson to the United States Court of Appeals for the D.C. Circuit, its members made much ado about the fact that she had attended Harvard Law School. Delegate Eleanor Holmes Norton touted her prior judicial clerkships, her work in criminal sentencing, “and, *of course*, . . . her education at Harvard Law School[,] where she graduated cum laude, having been the supervising editor of Harvard Law Review.”¹ It was this “top-of-the-mark academic background” that made Jackson “the entire package.”² Then-Speaker of the House Paul Ryan spoke similarly. Though their “politics . . . differ[ed],” he found her “clearly qualified,” in part because she was a “graduate of Harvard Law School.”³

A degree from an elite law school is highly valued within the federal judiciary.⁴ At all of its levels⁵—perhaps most notably, at the Supreme Court—Harvard and Yale graduates dominate, in part because graduates of those schools are seen as having the “intellectual horsepower”

¹ S. Hrg. 112-4, Pt. 9 (emphasis added).

² *Id.*

³ *Id.*

⁴ See, e.g., Karen Sloan, *For High Court, Harvard or Yale Degree Is a Virtual Prerequisite*, LEGAL INTELLIGENCER, (May 12, 2010) <https://www.law.com/thelegalintelligencer/almID/1202458004793/> (“You want smart, well-trained lawyers on the Supreme Court, and most of them go to the best schools — though not all smart lawyers go to Harvard and Yale . . . [t]hese are great law schools, and they’ve been great law schools for a long time.”) (quoting University of Michigan Law School professor Richard Friedman). The same is not necessarily true for state court judges, who are not the focus of this Note. In fact, “few graduates of elite law schools become state supreme court justices,” and the “situation in state trial and appellate courts is undoubtedly similar.” Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 U.C. DAVIS L. REV. 1105, 1148 n.75 (2018).

⁵ Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 247, 278 (2016) (“judges from a small number of law schools dominate every level of the judiciary.”).

required to do the job well.⁶ Indeed, even articles advocating for increased educational diversity on the bench choose to reach for Justice Stevens’s Northwestern degree and Justice O’Connor’s Stanford degree to argue that jurists who graduated from other schools are just as capable—despite these schools also being two of the most elite, prestigious legal institutions in the United States.⁷

Whether or not a more elitely-educated judiciary truly brings with it an intellectual benefit, the over-representation of certain law schools on the federal judiciary seems to have *some* effect on the way the judges on it treat the cases presented to them.⁸ Scholars have affirmed this suspicion in various fields of the law. In the tax sphere, for example, there are strong associations between elite education and outcome.⁹ In state criminal cases, legal education has been found correlated with decisions for the prosecution.¹⁰ And in labor law decisions, elite law school status also predicted outcomes.¹¹

To add to this literature, this Note analyzes judicial decisionmaking¹² in a field where the implications of judge educational background have not yet been studied—10b-5 securities fraud cases—and ultimately finds no correlation between the two. In line with sample sizes and

⁶ *Id.* at 276–77 (quoting Christopher Edley Jr., Opinion, *Why Elites Do Belong on the Supreme Court*, WASHINGTON POST, May 16, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/05/14/AR2010051403641.html>).

⁷ *Id.* at 277–78; see also *2023 Best Law Schools*, U.S. NEWS AND WORLD REPORTS, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> (ranking Stanford and Northwestern as the second and thirteenth best law schools in the country, respectively.)

⁸ See Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan*, 58 UCLA L. REV. DISCOURSE 129, 144 (2010) (discussing the view that it is “easier to sell a nominee . . . if the Harvard or Yale brand is employed,” because of the way in which it is assumed they will approach their cases).

⁹ Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473, 475 (2002).

¹⁰ Stuart S. Nagel, *Multiple Correlation of Judicial Background and Decisions*, 2 FLA. ST. U. L. REV. 258 (1974).

¹¹ James J. Brudney, et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to A Celebrated Concern*, 60 OHIO ST. L. J. 1675, 1751 (1999).

¹² Different authors write this word differently; some split it in two, some use a hyphen. This Note uses what its author found to be the predominant spelling in the field: decisionmaking, one word.

timeframes frequently found in the literature,¹³ the analysis considers all completed (i.e., any case not still listed as “ongoing”) 10b cases in the Second Circuit in the last five years,¹⁴ and biographical information about the presiding judge for those cases.¹⁵ The Note premised this analysis on the hypothesis that judges who attended elite law schools¹⁶ would be more likely to dismiss the case or otherwise side with a defendant; in line with the aforementioned air of “elitism” surrounding these Ivy-educated judges, it might be the case that they side with the larger, more monied party whose business interests they might want to protect.¹⁷ Contrary to this hypothesis, the analysis produced no statistically significant difference between judges who attended an elite law school and judges who did not. This finding suggests more nuance in the 10b-5 decisionmaking context than initially suspected, and that there is more work to be done to determine if commonly-held assumptions regarding the judiciary and its affinity for corporate interests are borne out by the facts.¹⁸

The Note proceeds as follows. Part I provides an overview of the relevant literature, both on judicial decisionmaking and Rule 10b-5 securities fraud scholarship. Part II discusses this Note’s methodology in compiling information and studying the relationship between the relevant

¹³ See *infra* note **Error! Bookmark not defined.** (discussing this sample size and comparing it with three other similarly-sized or smaller studies in the field).

¹⁴ Stanford Law School Securities Class Action Clearinghouse, <https://securities.stanford.edu/search-results.html>. Cases are classified as “ongoing,” “dismissed,” “voluntarily dismissed,” or “settled.” The list created contained all decisions except those that were “ongoing.”

¹⁵ This information includes age, race, gender, and the political party of the president who nominated them to the bench. Political party of nominating president is frequently used as a proxy for the political valences of a judge. See, e.g., Brudney et al., *supra* note 11, at 1679 (“scholars have often identified the political party of the appointing President as important in helping to predict judicial decisions.”).

¹⁶ See *infra* note **Error! Bookmark not defined.** for a discussion of how this Note coded law schools as “elite” and the literature on this topic more broadly.

¹⁷ As addressed below, 10b-5 cases seem to most frequently be decided in defendants’ favor in general; the plurality of the cases in this sample were dismissed.

¹⁸ See Ian Milhiser, *The Trumpiest Court in America*, VOX (Dec. 22, 2022), <https://www.vox.com/policy-and-politics/2022/12/27/23496264/supreme-court-fifth-circuit-trump-court-immigration-housing-sexual-harrassment> (discussing in the popular news media the view that the Fifth Circuit is beholden to “big money”); see also Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021) (discussing the inconsistent trajectory of the Supreme Court’s treatment of corporations and corporate interests).

factors. Part III presents the results of that analysis—briefly, that there was no correlation between education and 10b-5 decisionmaking, though there was one between age and decisionmaking—then discusses the findings and their implications as to educational diversity in the judiciary more broadly, the limits of this study, and potential areas for further research.

I. Literature and Background

There is a great deal of scholarship treating judicial decisionmaking more broadly, a large portion of which studies how judges' personal characteristics affect the decisions to which they come.¹⁹ Sen, for instance, discusses the impact of gender on judicial decisionmaking,²⁰ and Glynn and Sen discuss the impact of having a daughter.²¹ Pinello discusses the impact of race.²² Essentially, scholars hone in on singular aspects of a judge's identity or background and study how that background is connected to their general²³ or field-specific²⁴ decisionmaking. While

¹⁹ This premise behind this area of scholarship is well laid out in Segal and Spaeth's foundational work, *The Supreme Court and the Attitudinal Model Revisited* (2002), which theorizes that judges decide disputes "vis-a-vis the[ir] ideological attitudes and values." *Id.* at 86. To be sure, other articles from before Segal and Spaeth use the same theory, and expand on it by positing that it is not only conscious political views that affect judge decisionmaking, but also background and demographic characteristics. See, e.g., C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981) (discussing judge liberalism impacting their decisionmaking).

²⁰ Maya Sen, *Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, over Time*, 2017 WIS. L. REV. 367 (2017).

²¹ Adam Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015) (analyzing the impact of having a daughter on judge's decisions). See also *id.* at 38 (affirming that "[m]ore recent scholarship has enriched this understanding by exploring additional characteristics such as race and gender," and collecting articles studying these background characteristics).

²² Daniel R. Pinello, *Gay Rights And American Law* (2003); see also Nancy E. Crowe, *The Effects Of Judges' Sex And Race On Judicial Decision Making On The U.S. Courts Of Appeals, 1981-1996*, at 66-100 (1999).

²³ A good example of typical broad judicial decisionmaking research is found in Joanna Shepherd, *Jobs, Judges, and Justice: the Relationship between Professional Diversity and Judicial Decisions* (2021). Shepherd analyzes the gender, race, age, education, and professional backgrounds of Obama and Trump nominees to the federal courts, and delves into the impact of each in employment law cases. Another example is found in Laura P. Moyer, *The Role of Case Complexity in Judicial Decision Making*, 34 L. POL. 291 (2012), which analyzes multiple types of lawsuit that range in level of complexity.

²⁴ See, e.g., Christina Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) (analyzing the impact of judge gender in sex discrimination cases specifically).

some find no correlation,²⁵ many do. Sen, for example, finds that female and minority judges differ systematically from their white, male peers in important ways, such as “that they tend to be more liberal on average than comparable white male judges.”²⁶

A. Educational Background

Many judicial decisionmaking studies use educational background specifically as their unit of measurement, and many find a strong correlation (unlike this study). In the tax sphere, for example, Schneider finds that judges with elite law school educations are more likely to find in favor of the government.²⁷ Though Schneider’s association itself is confined to tax decisions, its implications are, he maintains, broader. In fact, Schneider asserts generally that “association of elite educations with pro-government decisions would seem to conform to the perception that liberal judges favor government regulation” in all spheres, but he suggests that education at nonelite institutions points in a different direction.²⁸ In other words, research indicates not only that educational background impacts judicial decisionmaking in a specific field, but that this trend has broader importance as to the policy of case outcomes—where judges went to law

²⁵ See, e.g., Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 28 (2001) (finding judge liberality not to be associated with background characteristics such as education, but suggesting that such differences may be found in other areas of judicial decisionmaking); Jared Ham & Chan Tov McNamarah, *Queer Eyes Don't Sympathize: An Empirical Investigation of Lgb Identity and Judicial Decision Making*, 105 CORNELL L. REV. 589 (2020) (finding no correlation between “LGB” status and judge decisionmaking).

²⁶ Sen, *supra* note 20, at 398.

²⁷ Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?*, 25 VA. TAX REV. 201, 230 (2005). As will be discussed below, Schneider’s methodology was in part a basis for the methodology of this Note. He controlled for gender, race, and appointing president’s party, but found that even so, law school eliteness was the driving factor in tax decisionmaking. In fact, in Schneider’s logistic regression of these factors, only eliteness of law school was statistically significant (other factors, like gender, had p-values as high as .785). Schneider also draws interesting conclusions from his findings. He suggests that since “[t]he eliteness of someone’s education has been seen as a signal of socioeconomic background,” socioeconomic class may play a role here. *Id.* at 233. But since there is a weaker correlation between socioeconomic status and *legal* education, as opposed to undergraduate education, the argument that socioeconomic status is the real driver of this correlation is attenuated.

²⁸ *Id.* at 234.

school may more broadly affect whether litigants may vindicate their rights against the government in federal court.²⁹

On the other hand, scholars like George and Goldman have found that judges who attended prestigious law schools were neither more liberal nor more conservative than other members of the bench.³⁰ But these studies are distinguishable. Many of these articles are decades old,³¹ and were written in a time in which the level of polarization in national and legal politics differed.³² Further, and importantly, even these older articles finding a lack of correlation between educational background and judicial decisionmaking stress that they “may not be looking in the right place for differences.”³³ To that end, some also argue that elite law school education affects the content, not the directionality of a decision. Elite law schools, they claim, “place greater emphasis on theoretical, as opposed to practical, analysis and on cutting edge jurisprudential ideas, so elite graduates may be more inclined to adopt novel legal arguments.”³⁴ This qualification leaves the door open for additional research on the impacts of legal education in different fields, such as those mentioned above.

While most authors find there to be at least some connection, that connection is often complicated by other factors, and complex in its decisionmaking ramifications. In the labor law

²⁹ See also Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (finding judge educational background to affect the *reasoning* of judicial opinions themselves). Again, the tangible impacts of these findings vis-à-vis judge educational background become clear.

³⁰ George, *supra* note 25, at 28 (citing, *inter alia*, Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-64*, 60 AM. POL. SCI. REV. 374 (1966), for the contention that no correlation has been found, but also recognizing that other studies have refuted this finding, such as Brudney et al., *supra* note 11 (1999) (discussed in more detail *infra*)).

³¹ Indeed, the Goldman article cited by George is almost 60 years old.

³² See, e.g., Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693 (2015) (“Since the 1970s, the Republican and Democratic caucuses have become increasingly homogenous and distant from each other.”).

³³ George, *supra* note 25, at 28.

³⁴ *Id.*

context, Brudney finds that while elite law school status predicted outcomes in many cases, it pointed in two different directions.³⁵ On one labor law issue, “graduates of elite law schools . . . were significantly more likely to *oppose* the union’s legal position.”³⁶ Conversely, in a separate set of labor issues, “elite law graduates were significantly more likely to *support* the union’s position.”³⁷ Brudney suggests that the former anti-union tendency might in part reflect socioeconomic background. But it may also be the case that “elite law schools . . . ground lawyers in an individual rights perspective that is less compatible with empathy for” plaintiffs’ claims; the judge’s law school education itself, then, may be what forms their substantive views on the parties in front of them.³⁸ This application of educational background analysis to the labor law field indicates that a judge’s education may have an important impact on the way their views on the law are shaped, and on the way that they ultimately shape the law, too.³⁹

B. Securities Fraud

This Note applies the understanding that educational background affects decisionmaking to the securities fraud context by analyzing cases brought under Rule 10b-5, which is the major cause of action in the field and has a unique history. Rule 10b-5⁴⁰ was promulgated by the

³⁵ Brudney et al., *supra* note 11, at 1751.

³⁶ *Id.*

³⁷ *Id.* (emphasis in original).

³⁸ *Id.* at 1752.

³⁹ The authors of the piece recognize that this somewhat dichotomized finding complicates this assertion. However, they provide some explanation for their finding that elite education can make a judge both more pro- and anti-union. First, they assert that the former of the two findings is more important than the latter. The latter finding, they argue, may be influenced by how many cases judges publish, and what cases the authors chose to study. Second, they argue that the former area of law is a more nuanced area of government regulation, which requires a different analysis, and in which there was a larger anti-union tendency found. Also, as mentioned above, the authors discuss socioeconomic background, and how it might inform the way in which certain labor law cases are viewed more intensely than others. Either way, the piece remains helpful because it shows that there is a real, nuanced way in which these two variables interact.

⁴⁰ Rule 10b-5 states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility or any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

Securities and Exchange Commission (“SEC”) in 1942, in order to “implement the broad directive of the 1934 [Securities Exchange] Act,” Section 10(b) of which “makes it unlawful for any person to engage in fraud or deceit in connection with the purchase or sale of securities.”⁴¹ Though there is no expressly created cause of action within § 10(b) or Rule 10b-5, federal courts have recognized an implied private cause of action since 1946.⁴² The Supreme Court itself addressed the issue for the first time in *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*,⁴³ and since then, it has consistently allowed so-called 10b-5 actions—now-common actions brought by shareholders because of misleading or fraudulent statements made by the company that affected its stock.⁴⁴ For almost 80 years, judges have been grappling with 10b-5

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5 (1993).

For a discussion of “the role of Rule 10b-5 in securities regulation generally, including its various elements,” see Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 148 (2010).

⁴¹ Stuart C. Plunkett, *Courts Lack the Power to Issue Contribution Bar Orders in Securities 10b-5 Cases*, 89 NW. U. L. REV. 1117, 1119 (1995). § 10(b) itself states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78j (1988).

⁴² Plunkett, *supra* note 41, at 1120. The law surrounding implied private rights of action is somewhat complicated, though in this context it is generally accepted. For a fuller discussion of when and how private rights of action are implied, see Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether A Private Action Will Be Implied from A Federal Statute*, 49 LOY. U. CHI. L.J. 117 (2017).

⁴³ 404 U.S. 6, 13 n.9 (1971) (“It is now established that a private right of action is implied under § 10(b).”).

⁴⁴ See, e.g., *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (creating a rebuttable presumption of reliance in implied 10b-5 cases); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148 (2008) (refining the parties against whom a 10b-5 action can be brought); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979) (affirming the implied 10b-5 right of action while denying to imply a right of action for a different SEC regulation, because Rule 10(b)

securities fraud cases. And, since the right of action allowing those cases is implied, they have been sculpting the field of law in a profound way.

As such, much of the scholarship surrounding 10b-5 actions touches upon judicial decisionmaking in the field, and finds some idiosyncrasies in its attempt to parse the unique ways in which judges shape this area of the law. Indeed, the scholarship seems to suggest that judges come to their decisions in the 10b-5 context in a somewhat *sui generis* fashion. Bainbridge and Gulati argue that opinions in securities fraud class actions often do not conform to standard models of adjudication, but instead “rely on rules of thumb” that are unique to the field.⁴⁵ Since securities law cases only make up a drop in the bucket of their overwhelming caseload, judges depend on these so-called heuristics when making their decisions. The heuristics are specific to securities law, such as the “doctrine that there is no duty to update ordinary earnings forecasts,”⁴⁶ or the heuristic of “no fraud in hindsight,” through which courts will not look backward to infer what information a company possessed prior to the disclosure of the alleged fraud.⁴⁷ Other

“prohibited certain conduct or created federal rights in favor of private parties.”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (characterizing 10b-5 actions as “a judicial oak which has grown from little more than a legislative acorn”). It is interesting to note that while in other areas of the law, implied private rights of action have become highly disfavored, and limited by the court, *see Alexander v. Sandoval*, 532 U.S. 275 (2001) (denying an implied right of action for Title VI because there was no clear congressional intent to create one), this has not been the case in the 10b-5 context. *See Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 382 (2014) (“The Court has read § 10(b) and Rule 10b-5 as providing injured persons with a private right of action to sue for damages suffered through those provisions’ violation.”); *but see Charles W. Murdock, Janus Capital Group, Inc. v. First Derivative Traders: The Culmination of the Supreme Court’s Evolution from Liberal to Reactionary in Rule 10b-5 Actions*, 91 DENV. U. L. REV. 369 (2014) (finding a “regress[ion of] Rule 10b-5 analysis” by the Supreme Court, in line with a broader recent trend of reactionism).

⁴⁵ Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does-Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L. J. 83, 84 (2002).

⁴⁶ *Id.* at 85.

⁴⁷ *Id.* at 127. The focus of the instant study is the Second Circuit, which is the “leading interpreter of U.S. securities laws” and has “handed down up to 70 percent of the opinions that appear in securities law casebooks.” Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225, 225 (2016). As such, it may not be the case that (1) securities fraud cases are only a small amount of the docket of a judge in the Second Circuit, or (2) those judges are completely unfamiliar with economics and general principles of securities trading. Still, though, Bainbridge and Gulati’s broader argument, that judges are normatively restrained and may not have the time or resources to understand complex economic issues fully—especially considering that it is frequently clerks who are serving one- or two-year terms and do not have a background in economics who are writing the opinions—arguably still stands. Further, Bainbridge and Gulati argue that judges care deeply about

authors qualify this heuristics analysis. Langevoort argues that judges are more motivated than the heuristics theory suggests and do put in the effort to get their cases right, but that “severe constraints of time and lack of knowledge force them to rely more on intuition about the right result than careful inquiry.”⁴⁸

This Note need not take a side in the debate, since it is clear either way that judicial decisionmaking in the 10b-5 context is complicated and depends on factors unique to the field and to the judge, which supports the ultimate finding of no correlation here. If judges depend on heuristics, what compels them to use the heuristics they do? If they depend on intuition, what parts of their experience and background inform that intuition? This Note continues this probing of *how* those decisions are made; while scholarship has focused in the past on the shortcuts to which judges turn when making decisions,⁴⁹ the parts of their background subconsciously affecting those decisions are ripe for study.⁵⁰

The two fields of legal scholarship discussed up to this point have been combined through a limited number of studies regarding how social background impacts 10b-5 decisionmaking, though there is room for more analysis. Most pertinently, Johnson et al. found that when female judges write an opinion in a securities fraud case, and potentially even when

prestige and criticism, which leads them to use these heuristics. This phenomenon is documented in other studies of judicial decisionmaking, *see, e.g.*, Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1392 (1998) (“ambitious judges could seek to maximize their ‘influence’ and ‘prestige’”) (citations omitted), which lends credence to their argument as a whole.

⁴⁸ Donald C. Langevoort, *Are Judges Motivated to Create “Good” Securities Fraud Doctrine?*, 51 EMORY L. J. 309, 310 (2002).

⁴⁹ *See also* Nat Stern, *The Constitutionalization of Rule 10b-5*, 27 RUTGERS L. J. 1 (1995). Stern discusses the use of “constitutional methodologies” by judges in the 10b-5 context, finding that they often “lose their relevance” when applied to this unique area of law. *Id.* at 4.

⁵⁰ As is discussed *infra*, the reason for which it is important to probe how the decisions are made is because these decisions are common, affect an entire class of people, and are part of a completely judge-made doctrine. *See infra* Part I.C (“Filling the gap will also provide clarity to the major players in the cases themselves.”). Practitioners, scholars, and parties all can gain from understanding what decisions come to and why they come to them, and that it is unlike other fields of law means it is difficult to do so unless these decisions and their inputs are studied.

they are simply sitting on a panel of judges, the outcome may be affected.⁵¹ Specifically, in all five 10(b) cases written by a woman Supreme Court justice, the ultimate decision was to reverse and remand at least one issue to the lower court.⁵² Further, a female-included panel was less likely than an all-male panel to lean towards the corporate defendant and more likely to impose sanctions.⁵³ The analysis thus demonstrates that other background characteristics of a judge affect their 10b-5 decisionmaking. However, while the authors found that a panel with female judges was less likely to be biased toward a corporate defendant, they leave open room for additional scholarship, as that finding is not analyzed to a great extent. Johnson et al. also qualify the findings that they do discuss, arguing that it may be only when the female justice actually *wrote* the opinion that something tangibly changes.⁵⁴ Yet, that there is not a significant finding of correlation between these two variables does not mean that background does not affect 10b-5 decisionmaking; rather, Johnson et al. “may not [have been] looking in the right place for differences.”⁵⁵

In fact, other authors like Fedderke and Ventoruzzo have found resoundingly that background variables do affect decisionmaking in securities cases. While its analysis looked at securities law more broadly, not just 10b-5 cases, one study found using multiple different measures of ideology that conservative justices differed in their securities decisionmaking from

⁵¹ Lyman Johnson et al., *Gender and Securities Law in the Supreme Court*, 33 WOMEN’S RTS. L. REP. 1 (2011). The article is interesting because, while the authors preface their article by noting that their “findings revealed no discernible gender impact on the outcome of securities cases in the Supreme Court,” they then go on to suggest that the findings “suggest several interesting and meaningful trends in securities cases involving female Justices,” which are what is discussed here. *Id.* at 2. Ultimately, the piece concludes by suggesting that when it comes to securities fraud cases, there is “some gender relevance.” *Id.* at 35. Also, it is important to note that the Article’s sample (1) comes from the Supreme Court not the Second Circuit, and (2) contains a mere 88 cases that span the nearly 40 years from 1971 to 2010, as opposed to the over 100 that this study found in the last five years alone. *Id.* at 11.

⁵² *Id.* at 15.

⁵³ *Id.* at 21–22.

⁵⁴ *Id.*

⁵⁵ George, *supra* note 25, at 28.

their liberal peers, who were “more protective of investors, . . . more concerned about market failures, and more in favor of private plaintiffs or government intervention.”⁵⁶ Again, it is evident that there are aspects of a judge’s social background that influence their decisionmaking in the 10b-5 sphere. This finding is similar to the labor law context, where education impacted how a judge saw the *law* itself, not simply the parties in front of them.⁵⁷

C. This Note Answers One of the Unknowns in the Literature by Analyzing Decisionmaking Vis-à-Vis Educational Background

Though some of these aforementioned studies have tackled the impact of judge background on 10b-5 decisions, many questions remain unanswered. Most broadly, there are aspects of personal background whose impacts on 10b-5 judicial decisionmaking have not been studied, including political affiliation, race, and educational background. This Note seeks to answer one of them, in studying whether legal educational background is correlated with or affects 10b-5 judicial decisionmaking.

The parallel findings in other areas of the law relating to judicial decisionmaking highlight why this question is important to answer. That educational background has been found to be a meaningful driver of judicial decisionmaking in the labor law context, for example, is relevant here for three reasons. First, the strong finding in that field indicates that it is important to study educational background in judicial decisionmaking in other fields, too. Second, this scholarship provides a close parallel to securities law. Both labor law and securities law are highly statutory and regulated areas of the law, and both are heavily impacted by administrative

⁵⁶ Johannes W. Fedderke & Marco Ventoruzzo, *Do Conservative Justices Favor Wall Street? Ideology and the Supreme Court’s Securities Regulation Decisions*, 67 FLA. L. REV. 1211, 1211 (2015). To be clear, the Article’s analysis did include 10b-5 cases in its selection of cases, *see id.* at 1244, but just included them in a broader selection of “the most important decisions.” *Id.*

⁵⁷ *See supra* note 20, at 7–8.

agencies—the National Labor Relations Board for labor law, and the SEC for securities law. This similarity provides support for the idea that educational background might play a role in securities law, too, especially considering that 10b-5 cases are class actions and thus at least in some way are similar to the collective bargaining claims toward which Brudney et al. find judges’ legal educations made them less empathic.⁵⁸ Also, similarly to labor law, it may be the case that securities law is a much more nuanced field with multiple or more individualized ways in which a judge decides a case.⁵⁹ Third, that the findings pointed in two different directions in this study might indicate that the judge’s decisionmaking does not necessarily depend on the *party* itself, but on some underlying ideological or subconscious view. Judges are in many ways socialized to the law by their legal education,⁶⁰ and they may view the cases in front of them as questions of pure law, not as controversies between specific parties and based on specific facts.

Filling this gap in the literature will provide further clarity in both the securities fraud literature and in the educational background literature, and a more direct answer as to the reasons these far-reaching cases come out in the way they do. From the 10b-5 perspective, initial analysis has made clear that decisionmaking in this field is *sui generis*, making a better understanding of what truly goes into those decisions vital for the reasons mentioned above. From the educational background perspective, the overrepresentation of specific law schools on the federal bench means that it is important to understand how specific schooling impacts the decisions that members of the federal bench make—if Harvard and Yale teach their students

⁵⁸ Brudney et al., *supra* note 11, at 1752.

⁵⁹ As will be discussed below, that this Note’s study does not find a straightforward relationship in the securities law field is bolstered by this parallel to labor law, and by Brudney et al.’s explanation of their dichotomized findings.

⁶⁰ See Gary D. Finley, *Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating Moby-Dick*, 97 CORNELL L. REV. 159 (2011) (discussing the power of the case method in shaping the law school experience).

(consciously or not) to decide cases a certain way, an awareness of that bias is helpful when there are future openings on the bench.

Filling the gap will also provide clarity to the major players in the cases themselves. The cause of action is so vital to contemporary securities law that it is useful to the parties to understand the analytical choices judges make, and its completely judge-made nature heightens the ramifications of the decisions. 10b-5 cases are brought frequently and offer a method of mass relief for a fraud that has affected a large group of shareholders. Analyzing them helps to actually access that relief.⁶¹ In other words, from the point of view of the practitioner,⁶² the legal scholar,⁶³ and the large group of people who have been tangibly defrauded, it is important to study this area of the law—such that the biases and other factors that may affect decisionmaking in 10b-5 cases can be uncovered. 10b-5 presents a unique cause of action that was fully created by judges and presents a decisionmaking process different from that which judges typically undertake. This process must be understood.

Lastly, the relationship between educational background and securities law specifically is a salient one because of the relationship between elite law schools and the business world. Many former judges—who, again, are more likely to come from elite law schools—are former partners at large corporate law firms.⁶⁴ Further, it is much easier to be hired at an elite law firm from one

⁶¹ The members of the class would benefit from a better understanding of judicial decisionmaking for obvious reasons; these decisions determine whether or not their claims will be vindicated and whether they will be remunerated for the fraud they suffered.

⁶² See Seymour, *supra* note 47, at 230–31 (discussing 10b-5 cases in the Second Circuit; the author is a partner at Sullivan and Cromwell). Practitioners can better structure their cases if they understand the factors judges weigh in making their ultimate decisions.

⁶³ See Bainbridge & Gulati, *supra* note 45.

⁶⁴ Brian Fallon and Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, THE ATLANTIC (2019), <https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/> (“Perhaps no qualification is more prevalent than prior work at a major private-sector firm, representing the interests of large corporations.”); see also Jack Karp, *The Law Firms Most Often Tapped for Federal Judges*, LAW360 (2022), <https://www.law360.com/pulse/articles/1460345/the-law-firms-most-often-tapped-for-federal-judges> (finding that 35 judges currently on the federal bench come from eight law firms alone).

of these top schools.⁶⁵ If these judges have this connection to large law firms, who are the most likely to represent large companies being sued in 10b-5 cases, they may be more likely to find for those defendants, who were previously their clients. This is how they spent their career, and the lawyers in front of them may be former colleagues. While some of the relevant literature posits that elite law school graduates are perceived “as ideologically liberal and inclined to government regulation,” a personal and intense connection to the 10b-5 defendant means this may not be the case here, especially considering that decisionmaking in this area of the law is already unique.⁶⁶ A better understanding of the correlation between these variables will contribute to the judicial decisionmaking scholarship as a whole, and will help to understand the implications of the overrepresentation of certain backgrounds on the bench more broadly.

* * * *

III. Results and Discussion

The results of the regression analysis indicate that there is no significant correlation between educational background and decisionmaking in 10b-5 cases. However, the results are still illuminating as to each of the variables individually, and as to the relationships among them, for at least three reasons. First, they indicate that the vast majority of 10b-5 cases in the sample were decided by judges who had attended elite law schools. Second, they indicate that 10b-5 cases seem quite likely to be dismissed. And third, there seems to be some correlation between age and judicial decisionmaking in 10b-5 cases.

A. Findings

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⁶⁵ See *Summer Associates*, Wachtell, Lipton, Rosen & Katz, <https://www.wlrk.com/careers/summer-associates/> (Wachtell, consistently ranked one of the most elite law firms, actively recruits associates solely from the seven top law schools).

⁶⁶ Brudney et al., *supra* note 11, at 1752.

a. Multivariate analysis

All of the variables were then considered together.⁶⁷ First, two logistic regressions tested the correlation between elite law school education and case outcome, while controlling for the confounding variables. In line with prior analysis, the first included voluntarily dismissed cases, and the second did not. In neither was there a statistically significant relationship. This result indicates that, even controlling for other factors that may have an impact on decisionmaking, including judge age, race, and gender, and the political party of their appointing president, there is no statistical relationship between elite law school and 10b-5 case outcome. Interestingly, there remained in both analyses a statistically significant relationship between age and case outcome, though the magnitude of the relationship was somewhat small.⁶⁸ Multicollinearity—the “situation in which some of the predictor variables in a regression equation are linearly related to each other”—is not a problem in this analysis, since only this one variable was found significant.⁶⁹

B. Implications

a. Implications of Case Result Distribution

First, it is important to discuss the implications of the fact that no cases were decided in favor of the plaintiff at all; even voluntary dismissal, which may be desirable to the plaintiff in a specific case, is not the same as an explicit ruling for a plaintiff. Since 10b-5 actions are class actions, voluntary dismissal means that an absent class member for whom individual suit is

⁶⁷ The results of the logistic regressions are found in the appendix.

⁶⁸ In the multinomial logistic regression, age had a statistically significant relationship vis-à-vis settlement, but not dismissal.

⁶⁹ § 6:14. The regression model—Multicollinearity, *The Statistics of Discrimination* § 6:14. In other words, there is no chance that the inclusion of age, race, gender, and party pushed the correlation between law school education and decisionmaking to be significant when it would not otherwise have been, because there was no statistical significance found, and only age was significantly correlated, anyway. Due to this lack of connection, “multicollinearity . . . does not . . . invalidate a regression analysis.” Jeff Todd & R. Todd Jewell, *Dubious Assumptions, Economic Models, and Expert Testimony*, 42 DEL. J. CORP. L. 279, 291 (2018) (citation omitted).

impractical no longer has their interests represented and may not have the wrongs perpetrated against them redressed.⁷⁰ That around 20% of all 10b-5 decisions from the last five years were voluntarily dismissed means there is a huge proportion of absent class members who were potentially defrauded by defendant companies but whose interests were not vindicated in court.⁷¹ While this finding has less to do with judicial decisionmaking because the plaintiff is leading the charge (subject to approval by the court), it is important in itself. It suggests more broadly that access to the courts in the 10b-5 sphere is more limited than it might seem at first blush, and it means that judicial decisionmaking in this area is more scarce and more skewed due to actions taken by the litigants themselves.⁷²

Second, that around 35% of 10b-5 cases in the last five years were settled undoubtedly has a huge impact on the law, too, though that impact is ambiguous. There is much debate as to whether settlement is in the public interest. Settlement may streamline the bloated federal

⁷⁰ “[C]lass action [is meant to] promote the interests of the absent class members,” whose claims are often too small or difficult to pursue in a one-off suit. Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 82 (2017). If the lead plaintiff chooses to dismiss their suit, absent class members who do not have either the financial capacity or a strong enough claim to bring their own suit are stuck waiting until another class is brought on their behalf, even though they are not technically barred by *res judicata* due to of the voluntary nature of the dismissal and therefore *could* bring their own suit if needed. On the other hand, scholars suggest that “it is rarely in the plaintiffs’ interests to voluntarily dismiss a certified class action,” so these voluntary dismissals frequently occur when the class is still putative, meaning most absent class members might not even know that they would be a part of the lawsuit or might end up outside the class for some other reason. Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J. L. REFORM 367, 418 (2003). Also, it is important to note that voluntary dismissal of a class is still governed by Fed. R. Civ. P. 23(e), meaning the judge must approve the action. In theory, then, in all of these voluntarily dismissed cases, the judge determined that it was “fair, reasonable, and adequate” to allow the case to be dismissed. Fed. R. Civ. P. 23(e).

⁷¹ And again, there is debate at the court regarding whether class members can bring their own claims after a class action, *see infra* note 86.

⁷² *But see* Solimine & Lippert, *supra* note 70, at 369. Solimine and Lippert argue that “the voluntary dismissal option can *encourage* litigation by increasing the value of the suit to the plaintiff. The option arguably makes it easier to file suit; it thus in effect enhances the value of the suit” (emphasis added). While 10b-5 litigation might be more scarce, then, the litigation itself might be more valuable. Plaintiffs see themselves as more in control of their suit, and can terminate it if it seems as though things will not go their way. In fact, Solimine and Lippert argue that Fed. R. Civ. P. 41(a), which governs voluntary dismissal, should be reformed to automatically grant requests for dismissal without prejudice, subject only to the condition that plaintiffs pay for defendants’ attorneys’ fees. *Id.* at 371. So the literature suggests that this relatively high frequency of voluntary dismissal is not inherently negative, given this perceived control by plaintiffs.

docket, and allow for a negotiated case outcome that is at least somewhat advantageous to both parties.⁷³ But on the other hand, it may also reflect a power imbalance between plaintiffs and large defendant companies, and may stand in the way of the broader judicial role of creating justice and “say[ing] what the law is.”⁷⁴ In the securities fraud field, the power balance between plaintiffs and defendants may not be as pronounced as in other areas of the law. Plaintiffs in 10b-5 cases are frequently sophisticated stockholders or even institutions like pension funds or established plaintiff law firms with the capacity to prosecute and fund expensive and protracted litigation.⁷⁵ But it is nonetheless undoubtedly true that settlement takes away the law-declaration power from the courts⁷⁶ and also greatly impacts absent plaintiffs without their consent, which does indicate a power imbalance between the parties.

Further, this large proportion of settled cases does have judicial decisionmaking implications. Unlike most non-class settlements, a judge must approve a 10b-5 settlement, so it is ultimately left up to their discretion whether to allow them to go forward.⁷⁷ Regardless of the results indicating a lack of correlation between elite education and this allowance, the data make clear that judges *do* decide to allow settlement a large percentage of the time. It is difficult to generalize due to the individualized nature of settlements. But this high percentage may denote

⁷³ See Stephen J. Ware, *Is Adjudication A Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 899 (2013) (advocating for alternatives to litigation, including arbitration and private settlements, because “[c]ourts are underfunded, dockets are crowded, and litigation is slow.”).

⁷⁴ *Marbury v. Madison*, 5 U.S. 137, 177 (1803). See also Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984) (arguing against settlements as a method for dispute resolution because of their potential for injustice); but see Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) (responding to Fiss and arguing that in the contemporary legal context, Fiss’s concerns no longer reflect reality).

⁷⁵ See Issacharoff & Klonoff, *supra* note 74, at 1180.

⁷⁶ See Fiss, *supra* note 74.

⁷⁷ Fed. R. Civ. P. 23(e); see also Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 381 (2011) (“Unlike other types of private litigation, these settlements require judicial approval.”). Sale discusses the “fiduciary-like role that judges play at the settlement stage of corporate and securities litigation,” and argues that judges are “gatekeepers” in class action settlement and should be guided by a clear set of principles she enumerates, as opposed to arbitrary and non-rigorous standards.

that judicial decisionmaking in the 10b-5 sphere, no matter what drives it, could contribute to (1) a decrease in securities fraud trials, and the aforementioned attendant consequences of this decrease,⁷⁸ and (2) a potential injustice or power imbalance that comes from settlement.⁷⁹ On the other hand, other studies of judicial decisionmaking explicitly count settlements as a win for the plaintiff. Ashenfelter et al. argue that by “not characterizing settlements as victories one would ignore most of plaintiffs’ true victories,” since settlement often provides the relief and vindication they seek.⁸⁰ However, even those authors recognize that a study “cannot look behind the settlements to test which are ‘truly’ successful” for plaintiffs.⁸¹ This relatively frequent allowance of settlement, then, may also mean that 10b-5 cases are to some degree a plaintiff-friendly area of the law, though the opacity of settlement complicates that general assertion.

Lastly, it bears analysis that the plurality of the cases analyzed—and almost a majority—were dismissed by the judge. Many factors likely contribute to this finding. Most notably, the Supreme Court’s decisions in *Bell Atlantic Corp v. Twombly*⁸² and *Ashcroft v. Iqbal*⁸³ transformed the motion to dismiss, heightening the pleading standard such that dismissal rates

⁷⁸ The most obvious consequence here is that some claims may not be vindicated in court—especially the claims of absent class members—but there are other consequences, too, such as that less law is made because fewer decisions are issued. See Galanter, *supra* note **Error! Bookmark not defined.** (discussing the implications of the fact that fewer cases reach the trial stage in the contemporary legal system); see also *supra* note 70 (discussing the consequences of a case not reaching the trial stage; while that discussion is centered around voluntary dismissals, there may be similar consequences for an absent class member when a case is settled).

⁷⁹ There is space here for powerful research going forward as to the specific consequences of particular settlements in the 10b-5 context. Indeed, the point is not that *all* settlements perpetuate injustice or create some larger consequence for the legal system; rather, it is just to say that the high number of settlements more broadly is part of the larger trend towards fewer trials, and also that settlements can impact absent class members or favor defendants. Both of these possibilities might be studied in the future. See also Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991) (contending that predictions of trial outcomes becomes increasingly difficult as more securities litigation settles); Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1384 (1994) (similarly contending that “where most cases settle, legal signals may lose clarity”).

⁸⁰ Ashenfelter et al., *supra* note **Error! Bookmark not defined.**, 271 n.41.

⁸¹ *Id.*

⁸² 550 U.S. 544 (2007).

⁸³ 556 U.S. 662 (2009).

increased considerably.⁸⁴ Second, the rise in powerful and more aggressive plaintiff-side firms may have contributed to an increase in the number of class action lawsuits more broadly and 10b-5 suits specifically. On its own, this rise could lead to an increase in motions to dismiss and successful dismissals simply because more cases were filed.⁸⁵ Regardless of these potential causes, the fact that there were so many cases dismissed in the sample is still notable. As was the case with settlement, dismissal means that absent plaintiffs' claims will no longer be vindicated in federal court, and that they are subject to *res judicata* effects.⁸⁶ And more notably, a dismissal is a clear ruling in favor of defendants. Consequently, it may not be clear what caused this skew toward more dismissal. But it seems to be the case that the federal judges in this sample ruled more for defendants than anyone else.⁸⁷

b. Implications of and Reasons for the lack of Correlation between the Variables of Interest

In addition to these implications for the legal system more broadly, the results suggest that there is not a correlation between elite law school education and the decisions that a judge

⁸⁴ See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L. J. 235, 239 (2012) (finding increases in dismissal after the cases came down).

⁸⁵ See Issacharoff & Klonoff, *supra* note 74, at 1180–84.

⁸⁶ The extent of this effect is unclear, though. Generally, defendants aim for dismissal of a class action precisely *because* it prevents future litigants from bringing suit based on the same claim—a concept known as “global peace.” For example, since the end of the Agent Orange mass tort litigation was meant to “provide the defendants with ‘final peace,’ [when] individual litigants who appeared to be members of the class attempted to sue the defendants independently . . . [t]he trial court dismissed the[ir] claims on the grounds that the doctrine of *res judicata* barred the action.” Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 741 (2006). However, other plaintiffs have been more successful; in the Agent Orange case, later plaintiffs were successful in bringing “collateral attacks” on slightly different claims. *Id.* See also *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983) (allowing absent class members to bring individual actions after the class *certification* was denied); *cf.* *China Agritech, Inc. v. Resh*, 584 U.S. ____ (2018) (denying a subsequent *class* action on the same claim when a first class action had been denied). Voluntary dismissal “generally has no preclusive effect whatsoever,” but a “motion to dismiss for failure to state a claim . . . generally is completely preclusive.” Bradley Scott Shannon, *Dismissing Federal Rule of Civil Procedure 41*, 52 U. LOUISVILLE L. REV. 265, 269 (2014).

⁸⁷ This idea aligns with the “conventional wisdom . . . that corporate defendants prefer federal court,” in part because it advantages them and their lawyers. Cathy Hwang & Benjamin P. Edwards, *The Value of Uncertainty*, 110 NW. U. L. REV. 283, 291 (2015).

comes to in a 10b-5 case. Put simply, the Note’s judicial decisionmaking hypothesis was found not to be correct. There are a few reasons why this might be the case. First, a potential explanation for this rejection of the hypothesis is that 10b-5 suits are a *sui generis* field of law and thus are defined by a *sui generis* type of judicial decisionmaking. As Bainbridge and Gulati and Langevoort argue, 10b-5 cases present complicated legal and economic questions, with which judges may not have the institutional resources to engage in the same way they do for other cases, and which may not have played as large a role in their legal education.⁸⁸ Securities law is not part of the typical first-year law school curriculum and may not be a required course at all.⁸⁹ By the same token, federal judges frequently practiced at a large law firm before taking the bench, and those firms deal frequently in securities fraud cases and other complex financial matters.⁹⁰ These cases are also somewhat common in the Second Circuit. So it is not as if the average federal judge is completely ignorant of securities law in general or 10b-5 cases in particular. Instead, judges (especially Second Circuit judges) may learn the language and intricacies of 10b-5 decisionmaking on the bench, or in private practice before taking the bench, so their decisionmaking in this area is not affected by their law school education in the same way

⁸⁸ See Bainbridge & Gulati, *supra* note 45 (discussing how judges decide 10b-5 cases); see also Langevoort, *supra* note 48 (same).

⁸⁹ See First Year Law School Curriculum: What to Expect, BARBRI LAW PREVIEW, <https://lawpreview.barbri.com/law-school-curriculum/> (“In general, the same seven foundational classes are taught during 1L year of law school. Those classes are Civil Procedure, Constitutional Law, Contracts, Torts, Criminal Law and Procedure, Legal Research & Writing, and Property Law.”).

⁹⁰ See Shepherd, *supra* note 23, at 6 (“Among Trump’s judicial nominees, [for example,] Am Law 200 partners made up almost 25 percent of those nominated to the district courts and almost 30 percent of those nominated to circuit courts. This means that Trump nominated Am Law 200 partners between 6–7 times more than if they were proportionately represented.”). Further, scholars suggest that corporate defendants prefer to litigate in federal court precisely because “federal courts may be more familiar with securities.” Hwang & Edwards, *supra* note 87, at 291–92.

as other areas of the law.⁹¹ They do not see these cases through the lens of their law school courses and professors in the same way they might see a question of tort law or civil procedure.⁹²

Another reason the hypothesis might have been skewed was that both the sample of judge law schools and the sample of decisions made were limited. As discussed above, a full 70% of the judges in the Second Circuit who had made 10b-5 decisions in the last five years had attended an elite law school, and 35% of them had attended Harvard or Yale alone. Federal judgeships are elite positions, and, as the anecdote that began this Note attests, those with elite educations are the first called to fill them. Second, none of the cases analyzed had been tried, so the opportunity to “find” for a plaintiff was limited; even settlements inherently contain concessions for each party, so it would be difficult to assign a settlement as being a decision “for” or “against” the defendant.⁹³ Also, while it was expected that most federal judges would come from an elite law school, the hypothesis depended on there being a wider variety of case dispositions, which there was not. As addressed below, this is an area for future research.

⁹¹ See Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333 (2008) (arguing that Supreme Court justices “learn how to be judges” while on the bench).

⁹² Indeed, in other areas of the law, the famed case method makes it such that law students “prepare for law lectures [by] relying exclusively on readings of judicial cases,” and thus that they spend their law school careers—especially in their first year—(1) familiarizing themselves with the ways in which judges make decisions in areas of the law like civil procedure, torts, property, and criminal law, and (2) being “guide[d]” by their professors as to how to interpret judicial decisions and apply the rules of law those decisions enunciate to new fact patterns. Finley, *supra* note 60, at 163 (2011) (quoting Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 596 (1997)).

⁹³ This skew in case disposition is in line with a broader decline in trials. The portion of civil cases that reached a trial in the federal system dropped from 11.5 percent to 1.8 percent from 1962 to 2002. Galanter, *supra* note **Error! Bookmark not defined.**, at 459. In general, there are increasingly fewer opportunities to study trial outcomes. In this study, a trial would have been helpful because it would have offered a clear indication that a ruling was for plaintiff; while a granted motion to dismiss is evidently a ruling in favor of defendant, there were no pre-trial dispositions in the sample that were clearly a ruling for plaintiffs. Voluntary dismissal is clearest since the motion is brought by plaintiff, but is largely inapposite, since it is litigant-driven. And again, whether settlement is a win for plaintiff is up for debate.

The finding of no correlation can also be reconciled with prior work.⁹⁴ It may be the case that, for the vast majority of cases filed, “the law—not the judge—dominates the outcomes,” and that judges “treat most cases as ones in which [external] interests are irrelevant or cannot change the outcome.”⁹⁵ There are two ways in which this study could be distinguished from that general rule, but neither is overwhelmingly convincing. First, the literature suggested that because this was a unique area of law and decisionmaking, opinions were rendered relying on heuristics that are unique to the field, as opposed to a deep knowledge of securities law itself.⁹⁶ However, that there was no correlation found in this study may indicate that this is not the case. Instead, this finding may indicate that securities law has been so affected by these rules of thumb that they themselves have *become* the law that determines the outcomes; judges, no matter what their background, rely on the same heuristics and come to the same decisions.⁹⁷ Also, the Second Circuit specifically is the foremost interpreter of securities law.⁹⁸ So, even if federal judges more broadly do not truly rely on the law when making 10b-5 decisions, it may be that Second Circuit judges specifically do; they have a more thorough understanding of the field and need not use rules of thumb or other personal knowledge, thus minimizing the impact of external characteristics.

Another implication of this finding is that judges may not rely as obviously on their legal education itself when making decisions. This Note did hypothesize that educational background is dissimilar to other characteristics like political party, because a judge who graduated from an

⁹⁴ See Ashenfelter et al., *supra* note **Error! Bookmark not defined.**, at 281 (reconciling the finding of no correlation between educational background and judicial decisionmaking in civil rights and prisoner cases with the broader context of the literature).

⁹⁵ *Id.*

⁹⁶ Bainbridge & Gulati, *supra* note 45, at 84–86.

⁹⁷ Ashenfelter et al., *supra* note **Error! Bookmark not defined.**, at 281.

⁹⁸ Seymour, *supra* note 47, at 225.

elite law school would not necessarily be cognizant of that part of their background and ideology when making a decision and actively change their thinking because of it. Instead, it theorized that educational background would be a subconscious influence.⁹⁹ However, that there was no correlation between the variables again demonstrates that this may not be the case, either; whether consciously or unconsciously, it might just be the cases that judges do not reach for other areas of knowledge—such as their law school education, or their political beliefs—when making 10b-5 decisions, instead depending on different characteristics, bases of knowledge, or the caselaw itself.

Lastly, if there truly is no correlation between these variables, this study may be used to refute other research and hypotheses in the judicial decisionmaking sphere. Some authors, for example, claim that elite-educated judges are seen as more ideologically liberal and more likely to favor governmental regulation.¹⁰⁰ That there was no significant difference here means this may not be the case—if judges who went to an elite law school are no less likely to dismiss a case against a large corporation than judges who did not, it might be extrapolated that they are no more “liberal” or “conservative.” That said, though, as George intimates, this study too may not have looked in the right place for a correlation between background characteristics and decisionmaking.¹⁰¹ Other areas of personal background may affect judicial decisionmaking more broadly—as other studies cited above demonstrate—or affect 10b-5 decisionmaking more specifically. And there is more work to be done to understand why dismissals were more common than any other outcome, given that educational background was not the cause.

c. Collateral Correlations: Age and Gender

⁹⁹ See Ashenfelter et al., *supra* note **Error! Bookmark not defined.**, at 281 (discussing similar influences).

¹⁰⁰ See, e.g., Schneider, *supra* note 27, at 230.

¹⁰¹ George, *supra* note 25, at 28.

This study did produce a statistically significant finding that might also aid in understanding 10b-5 decisionmaking: the multinomial logistic regression found that judge age was an aspect of judge background that had a statistically significant correlation to 10b-5 decision outcomes. As a judge gets older, their increased age correlates to an increased likelihood of settlement.¹⁰² This finding can also be squared with the research more broadly. Scholars have found an association between judicial age and rulings in other areas of the law, like discrimination cases.¹⁰³ That this association holds true here indicates that the effect of age on judicial decisionmaking is similar to the effects of gender and race on judicial decisionmaking, lending credence to the social background model more broadly.¹⁰⁴ Also, since settlement is a complicated and often difficult process,¹⁰⁵ it might be the case that older judges are more likely to approve a settlement because they have more experience on the bench and thus are more able to shepherd the parties towards settlement—that is, while judges may see settlement as the optimal outcome and are frequently actively involved in encouraging it, it might be that only those who have more experience on the bench can actually reach that outcome successfully.¹⁰⁶

¹⁰² In statistical terms, a binary variable, “caseoutcome2,” was coded. 0 was cases that were dismissed, and 1 was cases that were settled. When a logistic regression was performed, the coefficient was positive, meaning when age is increased, the dependent variable of case outcome is more likely—essentially, the outcome is more likely to be 1/settled than it is to be 0/dismissed. The coefficients when it came to age were uniformly correlated in this direction when different tests were performed, even when voluntarily dismissed cases were included.

¹⁰³ See Kenneth Manning et al., *Does Age Matter? Judicial Decision Making in Age Discrimination Cases*, 85 SOCIAL SCI. QUARTERLY 1, 15 (2004) (finding such a correlation).

¹⁰⁴ *Id.* at 16 (linking the finding of age being correlated to decisionmaking in discrimination cases to similar findings regarding gender and race).

¹⁰⁵ See, e.g., Sale, *supra* note 77, at 396–402. Sale provides three case studies of a settlement in a class action. The cited section discusses *In re TD Banknorth Shareholders Litigation*, 938 A.2d 654 (Del. Ch. 2007), which required in-depth analysis of, *inter alia*, share prices, the role of multiple defendants and their respective liabilities, months’ worth of executive meetings, intense discovery issues, the purposes of the merger, and fairness considerations. In that case, there were also three separate class actions that needed to be settled. The *TD Banknorth* litigation is demonstrative of the typical complexities that come with settlement in 10b-5 cases.

¹⁰⁶ See Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 73 (1995) (discussing the extent to which judges act to encourage settlement as part of their case management procedures).

Again, the relative benefits of settlement are unclear, as it provides some use and some drawbacks for both plaintiffs and defendants. It may provide an option for plaintiffs who would not be successful at trial to receive a somewhat beneficial outcome from a case.¹⁰⁷ But it also functions differently in the 10b-5 context than in, for example, some age discrimination cases, in that a class is involved here. Settlement thus has potentially broader implications here than in other contexts. Further, the correlation here could indicate that older judges are more friendly to plaintiffs, given that settlements are often “plaintiffs’ true victories.”¹⁰⁸ But that conclusion is attenuated by the fact that it is not always clear that (1) the settlement was a victory for the plaintiff at all (or to all plaintiffs, including absent ones, in the class context), or (2) the settlement was not equally or more beneficial to the defendant even if the plaintiff(s) felt satisfied with it, since settlement negotiations inherently result in terms at least somewhat acceptable to both sides.

Also, because judges must approve settlements in this context, the extent to which this bias would function is unknown. Even if a judge may be subconsciously biased towards one party, there may not be one specific point at which their bias would lead them to deny a settlement given its inherent give-and-take nature. The statistical significance of age is important because it indicates that some part of a judge’s background may subconsciously affect the settlement decisions they make in the 10b-5 context. But given the complexities of settlement, the inferences that can be drawn from that significance are more complex, too.

Gender at first seemed to be correlated independently with 10b-5 decisionmaking when analyzed alone and without voluntarily dismissed cases, but is ultimately not connected in a

¹⁰⁷ See Issacharoff & Klonoff, *supra* note 74, at 1190.

¹⁰⁸ Ashenfelter et al. *supra* note **Error! Bookmark not defined.**, at 271 n.41.

significant way. A correlation between these two variables would have been in line with the multitude of other studies finding that gender impacts judge decisionmaking, so this result was initially unsurprising.¹⁰⁹ However, when it was reanalyzed in context by including the other, potentially confounding variables of educational background, race, and age, the correlation between gender and 10b-5 decisionmaking was no longer found statistically significant.¹¹⁰ The correlation is not analyzed in depth here for that reason, besides noting that there was evidently a lurking variable that caused this initial significance, but that this variable may not be age because the coefficients of those two variables pointed in different directions.¹¹¹

* * * *

IV. Conclusion

Using statistical analysis, this Note built on the wealth of research in two fields to determine whether judge decisionmaking in the 10b-5 sphere was affected by an important part of a judge's identity—where they went to law school—but found no correlation between the two variables. Though legal educational background has been used as an independent variable for study in other areas of the law, this Note was the first to apply it to 10b-5 cases. The findings suggest that there is no statistically significant correlation between having attended an elite law school and dismissing or allowing settlement in a case, though there was a correlation between age and decisionmaking (itself an important finding). Nonetheless, this study still presents important contributions to the literature. First, this area of the law affects huge swaths of the public due to its impact on the economy, so a better understanding of what goes into the

¹⁰⁹ See, e.g., Sen, *supra* note 20.

¹¹⁰ This lack of significance held true in all multinomial logistic regression analyses. In all cases, the p-value was well above .05.

¹¹¹ In other words, age was correlated with increased settlement but gender was correlated with increased dismissal. If age was overpowering the gender variable when gender was analyzed alone, this might not have been the case.

decisions judges make when faced with a claim of securities fraud will help create a better understanding of when and how the broader public’s injuries due to this fraud will be redressed.¹¹² Second, the “public is more prone to trust a judiciary comprised of people representing a broad range of viewpoints rather than one or two dominant perspectives,” and the federal judiciary is overwhelmingly white, male, and elite educated.¹¹³ As the country becomes increasingly diverse, it is important that the judiciary reflect the population as a whole, as a more diverse judiciary “lends the courts a stronger sense of legitimacy and authority.”¹¹⁴ Research in other areas of the law also indicates that an increased diversity leads to what are ultimately more just opinions.¹¹⁵ Considering President Biden has made clear that he considers nominating diverse federal judges to be a priority, the overall impact of this diversity must be understood, especially in a sphere so integral to the contemporary legal and economic context.¹¹⁶ In order to better discern this impact, future studies should expand on the findings here by analyzing more cases, different outcomes, and different background characteristics in more detail.

¹¹² See Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887 (2013) (arguing that securities fraud not only affects stockholders but the markets more broadly in a profound way).

¹¹³ Shepherd, *supra* note 23, at 2.

¹¹⁴ Sen, *supra* note 20, at 372–73. In law school educational terms, it is also important that the judiciary better reflect the fact that the vast majority of lawyers do not attend Harvard or Yale.

¹¹⁵ See, e.g., Brudney et al., *supra* note 11 (finding non-elite law school graduates more likely to support unions in labor cases); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167–68 (2013) (finding that Black judges are more likely to find that the Voting Rights Act has been violated); Pinello, *supra* note 22 (finding that Black judges are more likely to side with LGBT plaintiffs); Cass Sunstein Et Al., *Are Judges Political?: An Empirical Analysis Of The Federal Judiciary* (2006) (discussing the impact of simply having a female or minority judge on a panel of judges). For a more thorough analysis of this literature, see Sen, *supra* note 20, at 374–78.

¹¹⁶ See Carrie Johnson, *President Biden Has Made Choosing Diverse Federal Judges a Priority*, NPR (Jan. 2, 2023), <https://www.npr.org/2023/01/02/1146045412/biden-diverse-federal-judges-women-black-appeals-courts>.

Applicant Details

First Name	Adam
Last Name	Silow
Citizenship Status	U. S. Citizen
Email Address	als384@georgetown.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>160 Bleecker St, Apt 9BE</div> <div>City</div> <div>New York</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>10012</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	7073383767

Applicant Education

BA/BS From	Arizona State University
Date of BA/BS	May 2016
JD/LLB From	Georgetown University Law Center
	https://www.nalplawschools.org/employer_profile?FormID=961
Date of JD/LLB	May 22, 2022
LLM From	Georgetown University Law Center
Date of LLM	May 22, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of National Security Law and Policy
Moot Court Experience	No

Bar Admission

Admission(s)	New York
--------------	----------

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

DeRosa, Mary
mbd58@law.georgetown.edu
202-841-2415

Livshiz, David Y.
david.livshiz@freshfields.com
212-417-3701

Donohue, Laura
lkdonohue@law.georgetown.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Adam Silow
160 Bleecker Street, Apt. 9BE
New York, NY 10012
June 8, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street, Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez:

I am an associate at Freshfields Bruckhaus Deringer US LLP, a graduate of the Georgetown University Law Center, and a former student editor-in-chief of the *Journal of National Security Law & Policy*. I am writing to apply for a clerkship in your chambers for the 2024-2026 term or any other available term. It would be a privilege to clerk in the city that raised my partner, and understand finally why she defends its reputation with such vigor and pride.

I applied to law school to become the first lawyer in my family and eventually build a public service career based on lessons I learned first-hand in legal systems around the world in Germany, the Democratic Republic of Congo, and here in the United States. I believe I can draw on these experiences, my work in law school, and my time as a practicing litigator to make a valuable contribution to your chambers.

Since graduating law school in May of 2022, I applied my coursework, journal experience, and internships at the U.S. Attorney's Office for the Eastern District of New York and the U.S. Senate Foreign Relations Committee to my practice at Freshfields. I focused my practice on cross-border litigation and investigations, including, for example, pro bono work representing a class of over 10,000 Afghan and Iraqi Special Immigrant Visa applicants in a class action suit against the federal government that has included second chairing depositions in my first six months and preparing an appeal before the D.C. Circuit. As a litigator, I aim to craft a long-term public service career in national security, fostering efficiency, accountability, and dispute resolution among public and private actors alike.

I have enclosed my resume, references, transcripts, and writing sample. Letters of recommendation will arrive separately from the supervisor and professors listed on the following references page.

I am more than happy to provide any additional information. You can reach me at 707-338-3767 or adam.silow@freshfields.com. Thank you for your consideration.

Very respectfully,

Adam Silow

List of References

David Livshiz
Partner, Freshfields Bruckhaus Deringer US LLP
David.livshiz@freshfields.com
212-284-4979

Professor Mary DeRosa
Professor, Georgetown University Law Center
Mbd58@law.georgetown.edu
202-841-2415

Professor Laura Donohue
Professor, Georgetown University Law Center
Amicus Curiae, U.S. Foreign Intelligence Surveillance Court
Lkd27@georgetown.edu
202-531-4433

ADAM SILOW

+1 707 338 3767 • 160 Bleecker Street, Apt. 9BE, New York, NY 10012 • adam.silow@freshfields.com

EDUCATION**GEORGETOWN UNIVERSITY****Washington, DC****Juris Doctor, Georgetown University Law Center (GPA 3.53)**

May 2022

Awards: Global Law ScholarJournal: Student Editor-in-Chief, Vol. 12, *Journal of National Security Law & Policy*Publication: “Bubbles over Barriers: Amending the Foreign Sovereign Immunities Act for Cyber Accountability,”
12 J. NAT’L SEC. L. & POL’Y 659 (2022)**Master of Science in Foreign Service, Walsh School of Foreign Service (GPA 3.91, distinction, top 20%)**

May 2022

Concentration: Global Politics & Security**BARRETT, THE HONORS COLLEGE AT ARIZONA STATE UNIVERSITY****Phoenix, AZ****Bachelor of Science in Economics and Bachelor of Arts in Global Studies (GPA: 4.00, summa cum laude)**

May 2016

Leadership: Founder & Editor-in-Chief, Global Affairs Theoretical & Empirical Journal; President, Model UN ClubAwards: Phi Beta Kappa Member, New American University Presidential Scholar, Barrett ScholarHonors Thesis: “Between War & Peace: Why Some Congo Narratives Evolve & Others Remain Entrenched” (2016)**EXPERIENCE****FRESHFIELDS BRUCKHAUS DERINGER US LLP****New York, NY****Associate, Dispute Resolution Group**

May – August 2021 (Summer Associate), September 2022 – Present

- Litigation: Second chairing depositions, managing document review, and conducting legal research for a pro bono class action against the federal government on behalf of over 10,000 Special Immigrant Visa applicants in *Afghan and Iraqi Allies v. Blinken*, including through discovery and an ongoing D.C. Circuit appeal; Drafted a pro bono appeal filed in state court on behalf of a domestic violence survivor; Drafted a pro bono parole hearing letter; Researched and drafted an amicus brief on foreign sovereign immunity before the Second Circuit.
- Investigations: Conducting legal research and document review for white-collar investigations spanning Europe and Asia.
- Cybersecurity and data privacy: Investigating data breaches and drafting breach notifications for global companies responding to U.S., U.K., and E.U. regulators; Providing pre-litigation support for a large U.S. tech company in Germany.
- Sanctions and export controls: Conducting legal research and writing on U.S. sanctions and export controls for U.S. and foreign clients in the aviation, telecommunications, pharmaceutical, and financial sectors.

Member: Halo (LGBTQ+ employee group)Publications: Blogs on sanctions, cyber, and foreign sovereign immunity (<https://blog.freshfields.us/u/10211s8/adam-silow>)**UNITED STATES SENATE FOREIGN RELATIONS COMMITTEE****Washington, DC****Law Intern, Democratic Staff**

January – August 2020

- Conducted legal research and writing on constitutional law, use of force, treaties, cyberattacks, foreign sovereign immunity, and emergency powers; Assisted with oversight investigations, including the first impeachment of President Trump.

UNITED STATES ATTORNEY’S OFFICE FOR THE EASTERN DISTRICT OF NEW YORK**Brooklyn, NY****Law Intern, General Crimes Section**

May – August 2019

- Argued two arraignments in court; Conducted legal research and writing on federal criminal jurisdiction, ethics, and evidence; Drafted indictments, analyzed call records and cell site location information, and edited warrants for active investigations.

FEMPO.NET**Goma, Democratic Republic of Congo****International Operations Manager**

February – June 2018

- Led strategic planning, communication, and recruitment for Fempo, a start-up NGO supporting women political candidates.

NEW YORK UNIVERSITY IN BERLIN**Berlin, Germany****Resident Assistant**

October 2016 – December 2017

- Implemented orientation of over 100 students in an international program and managed emergency situations and protocols.

OTHERBar Admission: New York State Bar (May 2023)Language Skills: German (fluent, dual US-German citizenship); French (basic)Personal Interests: Cooking my Bavarian Oma’s schnitzel & spätzle, reading fantasy novels, and swinging kettlebells

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Adam L Silow
GUID: 843107780

Course Level: Juris Doctor

Degrees Awarded:

Master of Science May 21, 2022
Graduate School
Major: Foreign Service
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law/Foreign Service
Major: Law/Global Law Scholars

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	92	Civil Procedure	4.00	B+	13.32	
			David Hyman				
LAWJ	002	92	Contracts	4.00	B	12.00	
			Girardeau Spann				
LAWJ	005	21	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Julia Ross				
LAWJ	008	21	Torts	4.00	B	12.00	
			Paul Rothstein				
Spring 2019							
LAWJ	003	21	Criminal Justice	4.00	B	12.00	
			Michael Gottesman				
LAWJ	004	92	Con Law I: Federal System	3.00	B+	9.99	
			Martin Lederman				
LAWJ	005	21	Legal Practice: Writing and Analysis	4.00	B	12.00	
			Julia Ross				
LAWJ	007	92	Property	4.00	B+	13.32	
			Madhavi Sunder				
LAWJ	235	50	International Law I: Introduction to International Law	3.00	A-	11.01	
			David Koplow				
LAWJ	611	03	Internal Investigation Simulation: Evaluating Corporate Corruption	1.00	P	0.00	
			Michael Cedrone				
Fall 2019							
LAWJ	903	01	JD/MSFS Registration		NG		
Spring 2020							
LAWJ	903	01	JD/MSFS Registration		NG		

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.00
Annual	0.00	0.00	0.00	0.00
Cumulative	31.00	30.00	95.64	3.19

Program Changed to:

Georgetown University Law Center
Juris Doctor
Major: Law/Foreign Service
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	014	05	Current Issues in Transnational (Private) Law Seminar	3.00	A-	11.01	
			David Stewart				
LAWJ	1127	08	Cyber and National Security: Current Issues Seminar	2.00	A	8.00	
			Mary DeRosa				
LAWJ	121	07	Corporations	4.00	A-	14.68	
			Charles Davidow				
LAWJ	1493	05	Prison Law and Policy	3.00	A-	11.01	
			Shon Hopwood				
Spring 2021							
LAWJ	165	09	Evidence	4.00	B+	13.32	
			Michael Pardo				
LAWJ	260	08	Research Skills in International and Comparative Law	2.00	A	8.00	
			Charles Bjork				
LAWJ	317	97	Negotiations Seminar	3.00	A	12.00	
			Julie Linkins				
LAWJ	662	05	Global Law Scholars Seminar II: Building an International Skill Set	1.00	P	0.00	
			David Stewart				
LAWJ	876	11	International Business Transactions	3.00	A	12.00	
			Don De Amicis				
2019-2021							
Transfer Credit:							
Georgetown Sch of Forgn Serv							
School Total:							
9.00							

-----Continued on Next Page-----

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Adam L Silow
GUID: 843107780

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2021 -----							
LAWJ	1245	09	Trial Practice and Applied Evidence	3.00	A-	11.01	
			Craig Iscoe				
LAWJ	1384	08	Computer Programming for Lawyers: An Introduction	3.00	P	0.00	
			Paul Ohm				
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	
			Louis Seidman				
LAWJ	361	03	Professional Responsibility	2.00	A-	7.34	
			Stuart Teicher				
LAWJ	661	05	Global Law Scholars Seminar I: Building an International Skill Set	1.00	P	0.00	
			David Stewart				
			EHrs	QHrs	QPts	GPA	
Current			13.00	9.00	33.03	3.67	
Cumulative			78.00	63.00	218.69	3.47	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2022 -----							
LAWJ	025	05	Administrative Law	3.00	A	12.00	
			Anita Krishnakumar				
LAWJ	1151	08	National Security Lawyering Seminar	2.00	A	8.00	
			Mary DeRosa				
LAWJ	1745	08	Foreign Intelligence Law	3.00	A	12.00	
			Laura Donohue				
Dean's List 2021-2022							
----- Transcript Totals -----							
			EHrs	QHrs	QPts	GPA	
Current			8.00	8.00	32.00	4.00	
Annual			21.00	17.00	65.03	3.83	
Cumulative			86.00	71.00	250.69	3.53	
----- End of Juris Doctor Record -----							

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand Adam Silow has applied for a clerkship in your chambers. I know Adam well from his time in law school and we have kept in touch since. He is smart, creative, and a very good writer. I recommend him enthusiastically.

Adam was a student in two of my national security law seminars: Cyber and National Security in the fall of 2020 and National Security Lawyering in the spring of 2022. His work was consistently excellent and he received an A in both classes. Adam always chose to tackle complex issues with his papers. His writing is polished and compelling. More importantly, his ideas are always creative and sophisticated. Adam was also my most reliable contributor to class discussions and I was continually impressed by the breadth of his knowledge and thoughtful responses. I thoroughly enjoyed having him as a student.

I first got to know Adam from his participation in the Global Law Scholars (GLS) program, which I co-direct. GLS is a small, selective program designed for Georgetown law students interested in international or transnational issues. GLS participants must have a background that includes international experience and proficiency in a second language (Adam speaks German). The GLS students meet regularly in their first year for discussions on international and national security law, leadership, and negotiation skills. In their second year, the students work as a group on a major project on a transnational or international law issue of their choosing. It is a challenging experience that helps them develop both substantive knowledge and critical teamwork skills. Adam was an active and effective participant in the group. Adam and his class produced a timely, thorough, and well-written report on *Arctic Summer: Law and Policy Implications of a Melting Arctic*. The group followed up by organizing an event in which they invited experts to discuss key Arctic legal and policy issues. Adam's contributions to the written report and the event were excellent.

As you can see from Adam's resume, he has a strong interest in international law, national security, and foreign relations. In fact, he graduated from Georgetown with both a JD and a Master of Science in Foreign Service. Because of this interest and my background in national security and foreign policy, we have had many conversations over the years. Adam is a humble, warm, and fun person. He is simply a pleasure to be around.

I know you would find Adam to be an exceptional law clerk and a terrific addition to your chambers. Please let me know if I can provide any additional information.

Sincerely,

Mary B. DeRosa
Professor from Practice
mbd58@georgetown.edu
202-841-2415

Mary DeRosa - mbd58@law.georgetown.edu - 202-841-2415

**New York**

601 Lexington Avenue, 31st Floor
New York, NY 10022

David Livshiz

T +1 (212) 277-4000

T +1 (212) 284-4979 (direct)

F +1 (646) 521-5779

E david.livshiz@freshfields.com

freshfields.us

June 5, 2023

Doc ID - Document1/0

Our Ref - DYL

Dear Judge:

I write in support of Adam Silow's clerkship application. I have worked with Adam since he joined Freshfields as a summer associate in 2021. Both as a summer associate and since returning to the firm full-time last year, Adam has proven himself to be an excellent associate with strong research and analytical skills. I feel confident that he would be an asset to your chambers.

I work with Adam on our firm's largest pro bono matter, where Freshfields (along with our pro bono partner, the International Refugee Assistance Project) represents a class of Afghan and Iraqi individuals who find themselves in danger as a result of their work for the U.S. government, and who have therefore applied for special immigration visas to the United States. This class sued the Department of State and the Department of Homeland Security to challenge systemic delays in the processing of their visa applications.

Adam joined the case in December, just as we entered a busy three-month discovery period, which involved twelve depositions, document review, and significant briefing. Adam jumped into each of these tasks with enthusiasm. He helped draft our written submissions and deposition outlines, demonstrating precise factual and legal research, and volunteered to manage the document review. Despite having never participated in a document review, Adam was eager to learn the process, which he ultimately managed with attention to detail and efficiency. Adam always has a long to-do list on this case—in great part because he regularly volunteers to take on more work, even when his billable work is busy—and he stays many steps ahead, making sure to send regular reminders and follow-ups to his managers on time-sensitive tasks. Adam's work on this matter has been so impressive that, as a first-year associate, he second-chaired several depositions, an opportunity usually given to much more senior associates.

Individual assignments aside, I have been constantly impressed by Adam's strategic thinking and grasp of new concepts. This case has a long, winding history that began in 2018, and yet Adam quickly understood the importance of various procedural and substantive elements of the case, and his work demonstrates that



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he thinks critically about each stage. I imagine this skill will be useful as a clerk, where clerks are asked to take over ongoing cases in a transition period.

Aside from the IRAP matter, I have also worked with Adam in defending one of the many Madoff-related clawback actions brought by the Madoff trustee, Irving Picard. The case raises a number of thorny procedural and substantive issues, and Adam was asked to research a complex question concerning imputation of knowledge and the faithless agent doctrine under New York law. Adam's research was detailed, thorough, and his analysis very crisp. Adam's research underpins our litigation strategy, demonstrating a skill beyond his level of seniority at the firm.

During his time at Freshfields, Adam has sought out and received extensive writing experience, working on a number of amicus briefs in addition to his regular docket. For example, he is a member of a team that is drafting an amicus brief to be submitted on behalf of several former government officials to the Second Circuit Court of Appeals arguing that the Terrorism Risk Insurance Act allows attachment of foreign central bank assets. Adam took the lead in researching and drafting critical sections of that brief. Similarly, Adam recently drafted the statement of facts in a petition challenging an administrative decision of the New York Office of Children and Family Services filed in New York state court under great time pressure. Within a day and a half, Adam had carefully reviewed the complicated administrative record, identified the facts relevant to the legal arguments and equities, and woven the facts into a clear, well-structured, and compelling narrative. As a result of his hard work and strong legal skills, Adam has earned a reputation as one of our stronger associates—as someone who can be entrusted with significant projects with confidence that he will carefully consider the issues and prepare strong written work product in an efficient and timely manner.

Finally, Adam's work—while excellent—is outshined by his demeanor. He is kind, inquisitive, and an overall team player. He makes sure that his colleagues are adequately supported even if that means taking on extra work that cuts into his own free time. I am confident that he would contribute similarly in a small chambers community.

If there is any further information that I can provide you with in support of Adam's application, please do not hesitate to ask.

Very truly yours,



David Y. Livshiz
Partner
Freshfields Bruckhaus Deringer US LLP



Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in strong support of Mr. Adam Silow, who is applying for a clerkship in your chambers. I first got to know Adam when I taught him in Foreign Intelligence Law in Spring 2022. He was a terrific student and regularly contributed to the discussion in ways that advanced the conversation. He performed exceedingly well on the final, earning one of the highest scores in the class and an A in the course overall. Most remarkably, he managed to perform at this high level all while serving as Editor-in-Chief of the law school's *Journal of National Security Law and Policy*, and completing his master's degree in Foreign Service at Georgetown – graduating from the Walsh School of Foreign Service with a 3.91 GPA. He would bring a tremendous amount of talent – and dedication – to your chambers.

Adam has a great love to constitutional law and is particularly interested in the tension between federal power and individual rights. A common thread throughout his law school career has been exploring the nexus through courses like Constitutional Law I and II, Foreign Intelligence Law, Administrative Law, and Prison Law. He has a deep grasp of the importance of separation of powers for democratic governance, having seen places where such boundaries have failed. He worked, for instance, in the DR Congo, where he witnessed the violence and corruption that proliferates in a system with a weak commitment to rule of law. He recognizes that the U.S. system is far from perfect, which is part of why he is so interested in clerking: he will have the opportunity to learn from judges, who are in critical positions to balance interbranch conflicts and to protect individual rights.

Adam's future is in public service. He has enjoyed working at an international law firm and, after paying off his law school and graduate school tuition over the next few years, he plans to bring that experience to working in national security law in the federal government. For him, the national security space provides a critical window into challenging questions related to separation of powers, privacy and cyber innovation, complex sanctions, and moral and legal questions on the use of force. Clerking would help to provide an invaluable mentorship and substantive legal research and writing skills for him to carry into his public service career.

Adam also seeks clerking as an opportunity to gain a unique vantage point. Typically, litigators spend their entire careers in court representing a party on one side of a case and zealously arguing for their client's interests. While he enjoys this work at the firm, he would welcome the opportunity to step back to weigh not just the advocates and arguments on different sides of a case. Beyond the substance of the law (which itself is often complex and can be challenging to understand fully), there is an immense amount of unwritten practice that guides the small and big decisions that judges make daily. Adam is the first in his family to ever go to law school and to become an attorney. He is excited to learn more about how the law is argued, judged, and written.

It is often difficult to tell from a transcript who an individual is as a person. Adam's identity is divided among many different groups, cultures, and places. He is an only child but has a large extended family. He holds dual citizenship with the United States and Germany. His father, who is Jewish, is from Brooklyn, while his mother, who is Catholic, was born in Bavaria. He has lived across the United States (New Mexico, California, Arizona, Ohio, Washington, D.C., and New York), as well as in many countries (such as Ghana, DR Congo, and Germany), and he has travelled widely.

Through his peripatetic upbringing and hyphenated identities, Adam has adapted and come to embrace being outside his comfort zone and pushing his limits. Whether it is sky- or scuba-diving, learning to box from a Serbian coach in Berlin, figuring out how to get past Congolese border guards without paying a bribe, or balancing law and masters classes with his sanity intact, he loves taking on new challenges he never thought he could do. It is not because he knows he'll succeed – he, himself, will admit that he often hasn't—at least at first (!). But he does it because, for him, life is too short to stay in one box and to limit what there is to learn about the world.

Adam would be a tremendous asset to your chambers. He brings intelligence, thoughtfulness, hard work, experience, and a willingness to delve into the most difficult questions. I recommend him without reservation.

Please feel free to reach out to me at 202 531 4433 if I can provide any additional information.

Yours sincerely,

Professor Laura K. Donohue, J.D., Ph.D. (Cantab.)
Scott K. Ginsburg Professor of Law and National Security
Professor of Law

Laura Donohue - lkdonohue@law.georgetown.edu

Upper-Level Writing Requirement Final Paper

The following is an excerpt from a paper submitted on March 15, 2020 without external editing for Professor David Stewart's class on "Current Issues in Transnational (Private International) Law." This paper addresses state-sponsored cyber attacks and the Foreign Sovereign Immunities Act, specifically whether the FSIA provides an avenue of redress for victims of cyber attacks. These excerpted pages cover pertinent legal research and analysis, comparing other proposals to amend the FSIA and presenting an alternative solution.

The full paper, which was published subsequently with revisions, can be found at: Adam L. Silow, "Bubbles over Barriers: Amending the Foreign Sovereign Immunities Act for Cyber Accountability," 12 J. NAT'L SEC. L. & POL'Y 659 (2022), available at https://jnsllp.com/wp-content/uploads/2022/06/Silow_Amending_the_Foreign_Sovereign_Immunities_Act_for_Cyber_Accountability.pdf.

[Excerpted passages]

A. Private suits are blocked by the current FSIA

Compared to government responses, such as prosecutions and offensive cyber, private responses directly by victims have seen even less success because of direct restrictions under the FSIA. The issue of private cybersecurity contractors adds another complicating factor to the question of liability. The FSIA does not provide a clear answer on whether private contractors receive derivative foreign sovereign immunity based on their government clients. Contractors providing legitimate services for intelligence, defense, and law enforcement activities are left uncertain about the potential liability they might face. Furthermore, the FSIA was passed before the modern digital era and does not properly account for contemporary cyber threats. Even the more recently passed exceptions do not account for cyberattacks.

1. Ambiguous derivative immunity creates uncertainty and liability risks for contractors

Returning to the ongoing litigation between WhatsApp and NSO in the Northern District of California—concerning foreign governments using NSO's Pegasus spyware to hack WhatsApp users—discovery stalled over the issue of derivative foreign sovereign immunity.¹ NSO filed a motion to dismiss WhatsApp's complaint, arguing in part, that the District Court lacked subject matter jurisdiction because NSO enjoyed derivative foreign sovereign immunity based on its alleged foreign sovereign clients. NSO argued for immunity because it believed—accurately so (as outlined in the next section)—that none of the current FSIA exceptions apply to

¹ The closest any of the direct victims have come to challenging NSO Group is a lawsuit by Amnesty International (AI) against NSO Group in Israel to have the company's export license revoked for monitoring human rights activists, including one of AI's researchers. The Tel Aviv District Court Judge dismissed the lawsuit for failure to "substantiate" the claim, finding the Israeli Defense Ministry's "thorough and meticulous" process for granting export licenses was sufficiently sensitive to human rights violations. Oliver Holmes, *Israeli Court Dismisses Amnesty Bid to Block Spyware Firm NSO*, GUARDIAN (July 13, 2020), <https://www.theguardian.com/world/2020/jul/13/israeli-court-dismisses-amnesty-bid-to-block-spyware-firm-nso>.

NSO's conduct, meaning WhatsApp, and other injured parties, would not have a viable claim for relief against NSO.

The FSIA does not explicitly provide derivative immunity for contractors. Consequently, the question has been left to judicial interpretation. The Ninth Circuit has not previously adopted a rule regarding derivative foreign sovereign immunity, but NSO argued that the District Court in Northern California should adopt the rule outlined by the Fourth Circuit in *Butters v. Vance*.² The Fourth Circuit upheld derivative foreign sovereign immunity when an employee of a U.S. security company hired by Saudi Arabia sued the company for gender discrimination. The Fourth Circuit drew its conclusion from the rule that U.S. domestic contractors receive the privilege of derivative immunity when contracting for the United States government; the Fourth Circuit held that it is “but a small step to extend this privilege to the private agents of foreign sovereigns.”³

The Northern California District Court, though, found NSO was asking for a larger step than it conceded. On July 16, 2020, Chief District Court Judge Phyllis J. Hamilton denied NSO's motion to dismiss and rejected the adoption of derivative foreign sovereign immunity.⁴ Judge Hamilton emphasized that the Ninth Circuit has not adopted the derivative rule from *Butters*, and even if it had, NSO would not satisfy the standard because it is incorporated outside the United States.⁵ Judge Hamilton also objected to the Fourth Circuit's reasoning, arguing “there are different rationales underlying domestic and foreign sovereign immunity.”⁶ Domestic sovereign immunity is grounded in exercising valid constitutional authority from the U.S. federal government. Foreign sovereign immunity, on the other hand, is “a matter of grace and comity on the part of the United States,” wrote Judge Hamilton.⁷ Judge Hamilton did not imply derivative foreign sovereign immunity is unconstitutional, or even unwise as a policy matter. Rather, her reasoning suggests the doctrine of derivative foreign sovereign immunity is for the legislative and executive branches to resolve, not the judiciary.

There is an additional reason why derivative immunity is best left to the other branches—customary international law (“CIL”). Judge Hamilton slightly overstated the importance of grace and comity in outlining the basis of foreign sovereign immunity. Scholar David Stewart writes that grace and comity, despite frequent reference, “are nowhere to be found” in Chief Justice John Marshall's “seminal” opinion in *The Schooner Exchange*, which first recognized foreign sovereign immunity.⁸ Instead, Marshall's opinion “refers to the usage and principles adopted by

² 225 F.3d 462, 466 (4th Cir. 2000).

³ *Id.*

⁴ Although it is beyond the scope of this paper, the District Court's approximately seventy-four-page order covers a host of fascinating, complex cyber issues, including how personal jurisdiction is analyzed under the tests of purposeful direction and purposeful availment for foreign defendants alleged to have hacked into the forum state. *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 472 F.Supp.3d 649 (N.D. Cal. July 16, 2020) (finding that the court had subject matter jurisdiction and personal jurisdiction, while granting the motion to dismiss WhatsApp's fourth cause of action for trespass to chattels because WhatsApp failed to allege actual damage to infected servers).

⁵ *Id.* at 667 (“In *Butters*, the defendant asserting derivative sovereign immunity was a U.S. corporation and the Fourth Circuit's reasoning indicated that the U.S. citizenship of the company was necessary to its holding.”).

⁶ *Id.* (citing *Broidy Cap. Mgmt. L.L.C. v. Muzin*, No. 19-CV-0150 (DLF), 2020 WL 1536350, at *7 (D.D.C. Mar. 31, 2020) (denying derivative foreign sovereign immunity to defendant companies working for Qatar, who were sued for hacking into the plaintiff's computers in response to his criticism of Qatar)).

⁷ *Id.* (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

⁸ STEWART, *supra* note 27, at 6; *see also* *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812).

the unanimous consent of nations—what today we refer to as customary international law.”⁹ CIL is created by *opinio juris*—a sense of legal obligation—and state practice—requiring the custom be widespread, longstanding, and generally accepted by other states.

Congress and the President are the primary drivers of U.S. state practice as part of CIL. Under the U.S. Constitution, the executive and legislative branches are given primacy over the judicial branch in foreign affairs. The President, under Article II, is commander-in-chief of the armed services and has the power to conduct diplomacy.¹⁰ Under Article I, Congress is given the foreign commerce power and authority to create and maintain the military, declare war, and “define and punish piracies and felonies committed on the high seas, and *offenses against the law of nations*” (emphasis added).¹¹ Although foreign sovereign immunity is entrenched in CIL, derivative immunity is not. Congress should pass, and the President should sign, derivative foreign sovereign immunity into law. Doing so would not only produce good policy in an otherwise murky area, but it would also begin a new state practice that could eventually crystalize into CIL.

Derivative foreign sovereign immunity would create certainty because cybersecurity companies contracting with states are currently operating in a gray area of liability. For most contractor industries—such as construction or physical security—immunity in foreign courts will not be an issue as they only need to worry about legal liability from the domestic jurisdiction in which they contract in. Contractors in the cybersecurity industry, however, are at a higher risk of complex, foreign litigation because they provide services and products which can cause substantial effects and harm across borders. Cybersecurity contractors’ cross-border activities affect a broader pool of potential foreign plaintiffs and raise complicated conflict of laws questions regarding jurisdiction, choice of law, and judgment-recognition. It is in the United States’ interest to clarify its position through domestic legislation and further a new international custom of derivative foreign sovereign immunity to create legal certainty for U.S. and foreign cybersecurity contractors.

Leaving the question of derivative immunity to the courts will not solve the problem. If U.S. contractors are sued outside the Fourth Circuit, it is unlikely they would receive immunity. The derivative immunity question in the WhatsApp lawsuit is now on appeal before the Ninth Circuit. If the Ninth Circuit rejects derivative foreign sovereign immunity, cybersecurity companies supporting legitimate state functions of law enforcement and national security will be exposed to litigation risks, even though their government partners will enjoy immunity. On the other hand, if the Ninth Circuit extends NSO derivative immunity, it is likely NSO will escape liability for its actions because none of the FSIA’s current exceptions will apply.

2. Current FSIA exceptions do not apply to cyberattacks

The FSIA provides nine distinct exceptions for which states may be held liable.¹² Assuming immunity is not waived by a state, three other exceptions—commercial activity,

⁹ STEWART, *supra* note 27, at 6.

¹⁰ U.S. CONST. art. II, § 2, cl. 1-2.

¹¹ U.S. CONST. art. I, § 8, cl. 3, 10-15. More broadly, Congress can influence U.S. foreign affairs through its power of the purse and the necessary and proper clause. U.S. CONST. art. I, § 9, cl. 7; *id.* art. I, § 8, cl. 18.

¹² See generally STEWART, *supra* note 27, at 47-136 (outlining the scope and elements of all nine exceptions, which include waiver, commercial activity, expropriations, rights in certain kinds of property in the United States,

tortious conduct, and terrorism—are potentially relevant in the context of cyberspace. None, however, provide injured parties with an effective avenue of accountability—whether declarative, injunctive, or compensatory relief—in U.S. courts against hacking states.

The most litigated FSIA exception is for commercial activity.¹³ The commercial activity exception strips sovereign immunity for a state conducting commercial activities as a private individual or company would in business.¹⁴ The statute defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act.”¹⁵ In addition, the FSIA emphasizes commercial activity is determined by its nature, not its purpose.¹⁶ Thus, commercial activity is not based on a profit motive, but “whether the government’s particular actions (whatever the motive behind them) are the *type* of actions by which a private party engages in commerce.”¹⁷ The Ninth Circuit recently concluded that “a foreign government’s conduct of clandestine surveillance and espionage against a national of another nation in that other nation is not ‘one in which commercial actors typically engage.’”¹⁸ Cyberattacks against human rights activists—individuals with no clear business connection—are also unlikely to constitute commercial activity.

In a recent article, Jerry Goldman and Bruce Strong argue that the commercial activity exception covers hacking trade secrets based on a D.C. District Court decision in *Azima v. RAK Investment Authority*.¹⁹ In that case, the District Court found that a UAE state investment entity’s hacking of a businessman constituted commercial activity under the FSIA.²⁰ The District Court focused on the overlap in timing, emphasizing that the UAE entity hacked the businessman as mediation began between both parties.²¹ Based on the *Azima* Court’s reasoning, Goldman and Strong argued that “steal[ing] trade secrets for the purpose of giving their own companies a competitive commercial advantage” would “neatly fall under the commercial activity exception.”²² Not so. Hacking during mediations is different from cyber economic espionage.

noncommercial torts, enforcement of arbitral agreements and awards, state-sponsored terrorism, maritime liens and preferred mortgages, and counterclaims); *see also* 28 U.S.C. §§ 1605(a)(1)-(6), 16-5(A), 1605(b)-(d), 1607.

¹³ STEWART, *supra* note 27, at 50-51.

¹⁴ 28 U.S.C. § 1605(a)(2).

¹⁵ 28 U.S.C. § 1603(d).

¹⁶ *Id.*

¹⁷ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 607 (1992) (finding Argentina’s issuance of bonds with repayment in U.S. dollars in several markets, including New York, was a commercial activity with a “direct effect in the United States” under the FSIA).

¹⁸ *Broidy Cap. Mgmt., L.L.C. v. Qatar*, 982 F.3d 582, 594 (9th Cir. 2020); *see also* *Democratic Nat’l Comm. v. Russian Federation*, 392 F.Supp.3d 410, 429 (S.D.N.Y. 2019) (finding that Russia’s hacks against the Democratic National Committee in 2015 did not constitute commercial activity because “transnational cyberattacks are not the ‘type of actions by which a private party engages in trade and traffic or commerce’”).

¹⁹ Jerry Goldman & Bruce Strong, *Overcoming Immunity of Foreign Gov’t Cyberattack Sponsors*, LAW360 (Dec. 2, 2020 5:07 PM), https://www.law360.com/cybersecurity-privacy/articles/1332591/overcoming-immunity-of-foreign-gov-t-cyberattack-sponsors?nl_pk=7733056d-73e1-469d-a74f-7a8f7677c91c&utm_source=newsletter&utm_medium=email&utm_campaign=cybersecurity-privacy.

²⁰ *Azima v. RAK Inv. Auth.*, 305 F.Supp.3d 149 (D.D.C. Mar. 30, 2018), *rev’d*, 926 F.3d 870 (D.C. Cir. 2019) (reversing the District Court on separate grounds because a forum selection clause established England as the proper venue).

²¹ *AZIMA* 166 (“Azima starts off noting that the hacking of his computer began in October of 2015 and continued through the summer of 2016—a time period that roughly corresponds with the time in which Azima served as a mediator between RAKIA and its former CEO.”)

²² Goldman & Strong, *supra* note 59.

Unlike the facts in *Azima*, hacks of trade secrets are unlikely to occur simultaneous with a commercial activity. A company receiving the stolen trade secrets will be unable to take commercial advantage of the information likely until long after the actual hack is complete. Establishing the causal link without an easy temporal inference will require significantly more evidence and resources. The District Court's reliance in *Azima* on a close-in-time overlap in activity means plaintiffs will struggle to bring cases involving cyber economic espionage that link hacks with ongoing commercial activity.

The FSIA also includes a noncommercial tort exception, which provides that states are not granted immunity for cases:

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment (emphasis added).²³

In 2015, one author envisaged the FSIA's tort exception as a possible path for holding state-sponsors of cyberattacks accountable.²⁴ The author pointed to two cases—*Letelier v. Republic of Chile*, and *Liu v. Republic of China*—in which assassinations by foreign agents in the United States satisfied the tort exception.²⁵ Nonetheless, the D.C. Circuit refused to apply the tort exception in the context of a cyberattack by Ethiopia against a human rights activist in Maryland.²⁶ The D.C. Circuit distinguished the foreign cyberattack from the assassination cases by emphasizing the tort exception's situs requirement, which provides that the entire tort must occur in the United States. Although the assassins in *Letelier* and *Liu* were foreign agents, their tortious conduct occurred in the United States—the Taiwanese agent shot a man in California, and the Chilean agents “constructed, planted and detonated a car bomb in Washington, D.C.”²⁷ While there may be an argument that the assassination planning occurred abroad, the D.C. Circuit emphasized that the injury caused by Ethiopia's cyberattack included not only an “intent to spy” from abroad but also an “initial dispatch” of malware in Ethiopia, meaning “integral aspects of the final tort...lay solely abroad.”²⁸ States rely on cyberattacks precisely because of the ability to affect targets in a different location from where the attack is launched. Cyberspace provides a means of covertly reaching across borders and harming entities or states that are otherwise inaccessible. Therefore, most cyberattacks are likely to run afoul of the tort exception's situs requirement.

Congress has amended the FSIA several times related to terrorism. In 1996, Congress added an exception for state-sponsored terrorism, removing immunity for certain acts of terrorism, such as torture, extrajudicial killing, aircraft sabotage, hostage taking, or material support.²⁹ An important provision in the new exception provided that immunity would only be removed for states formally designated by the U.S. Secretary of State as a sponsor of terrorism.

²³ 28 U.S.C. § 1605(a)(5).

²⁴ Scott A. Gilmore, *Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act*, 46 COLUM. HUM. RTS. L. REV. 223 (2015); Goldman & Strong, *supra* note 59.

²⁵ *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.D.C. 1980); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

²⁶ *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7, 11 (D.C. Cir. 2017).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

With the state sponsors of terrorism list, the executive branch acts as a gatekeeper, tightly limiting the number of countries who face liability. When the terrorism exception passed in 1996, only six states were on the list: Cuba, Iran, Libya, North Korea, Sudan, Syria, and Iraq. As of March 2021, only Cuba, North Korea, Iran, and Syria remain.³⁰

Congress broadened the terrorism exception in 2008 under 28 U.S.C. § 1605A by removing the bar on punitive damages and creating a federal cause of action that could be applied retroactively.³¹ In 2016, Congress passed—over the president’s veto—an additional exception under § 1605B known as the Justice Against Sponsors of Terrorism Act (JASTA).³² Frustrated by the executive branch’s refusal to list certain countries, specifically Saudi Arabia, Congress passed JASTA to provide another legal avenue against perpetrating states, regardless of designation by the Secretary of State. JASTA also removed the entire tort requirement for acts of international terrorism that take place in the United States, as defined by the Antiterrorism Act (ATA).³³ Nonetheless, plaintiffs have not yet succeeded in bringing claims under JASTA. For example, the families of the 9/11 victims protested the removal of Sudan in December 2020 from the state sponsors of terrorism list because it would remove their ability to bring claims under § 1605A and they did not see JASTA as a viable path for their claims against Sudan.³⁴ Despite Congress’ intentions, JASTA has not yet demonstrated that it is a suitable alternative to §1605A.

The FSIA’s terrorism exceptions under either §1605A or §1605B (JASTA) were created to address a specific harm—violent terrorist acts—and, therefore, do not fit well for harms in cyberspace. Nonetheless, some authors argue otherwise.³⁵ Goldman and Strong acknowledge that the state sponsor exception “does not at first blush appear to apply to hacking,” but continue on to provide examples they believe could apply.³⁶ They argue hacking an airplane or air traffic control could constitute aircraft sabotage, hacking a hospital causing patients to die without

³⁰ See State Sponsors of Terrorism, U.S. DEP’T STATE, <https://www.state.gov/state-sponsors-of-terrorism/#:~:text=Currently%20there%20are%20three%20countries,%2C%20Iran%2C%20and%20Syria.&text=or%20more%20details%20about%20State,in%20Country%20Reports%20on%20Terrorism> (last visited March 16, 2021).

³¹ 28 U.S.C. § 1605A (including three other limitations: 1. a ten-year limitations period; 2. the claimant or victim was a U.S. national, member of the armed forces, or otherwise a U.S. employee or contractor; and 3. the claimant must first afford the “foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration”).

³² Pub. L. No. 114-222, 130 Stat. 852 (2016); see Rachael E. Hancock, ‘Mob-Legislating’: JASTA’s Addition to the Terrorism Exception to Foreign Sovereign Immunity, 103 CORNELL L. REV. 1293, 1294 (2018) (“On September 28, 2016, a politically divided United States Senate overrode President Barack Obama’s veto for the first and only time in a particularly decisive vote: 97–1.”).

³³ 18 U.S.C. § 2331 (defining international terrorism as activities involving: a) violent acts or acts dangerous to human life that b) appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping).

³⁴ Lara Jakes, *U.S. Prepares to Take Sudan Off List of States That Support Terrorism*, N.Y. TIMES (Sept. 24, 2000), <https://www.nytimes.com/2020/09/24/us/politics/us-sudan-terrorism.html> (The delisting of Sudan resolved Sudan’s payments to victims of the 1998 East Africa Embassy bombings and the 2000 Cole bombing, but 9/11 families also believe they have viable claims against Sudan for supporting Al-Qaeda. The 9/11 victims’ families “broadly objected to the immunity legislation before their own legal cases against Sudan are resolved.”).

³⁵ See, e.g., John J. Martin, *Hacks Dangerous to Human Life: Using JASTA to Overcome Foreign Sovereign Immunity in State-Sponsored Cyberattack Cases*, 121 COLUM. L. REV. (forthcoming Jan. 2021); Goldman & Strong, *supra* note 59 (arguing that both § 1605A and § 1605B apply).

³⁶ Goldman & Strong, *supra* note 59.

access to medical care might be extrajudicial killing, and hacking “infrastructure that traps people in a particular location” might be hostage-taking.³⁷ The authors provide no evidence that any of these hyper-specific examples are widespread phenomena or have ever occurred. For example, in September 2020, a ransomware attack on a German hospital was suspected as causing “the first known death from a cyberattack,”³⁸ but police later clarified the patient’s poor health was the cause of death and “the delay [in medical care from the ransomware] was of no relevance to the final outcome.”³⁹ While a cyberattack that causes physical damage to humans may constitute a violent terrorist act, such attacks make up few, if any, of the current wave of cyberattacks. In addition, plaintiffs relying on §1605A’s state sponsors exception are currently only able to sue the four listed states—Cuba, Iran, North Korea, and Syria. Other state sponsors of malicious cyberactivity, notably Russia and China, face no liability under the state sponsors exception.

John Martin writes that cyberattacks fit under §1605B (JASTA), which relies on the substantive elements under the ATA, rather than the limited acts enumerated in §1605A’s state sponsors exception. Martin argues the ATA’s inclusion of “acts dangerous to human life” is broad enough to cover cyberattacks.⁴⁰ JASTA, according to Martin, could provide protection for political dissidents if, for example, “the act of distributing secret information after a data breach could endanger human life if it contains personal information about an individual that then subjects them to potential targeting and harassment.”⁴¹ Plaintiffs, however, would need to prove a complicated chain of causation connecting the state to the hack to the breached secret information to harassment that causes dangers to human life. Stealing trade secrets is even more attenuated to dangerous affects to human life. Even if human rights activists have a potentially viable path under JASTA, cyberattacks causing massive economic damage without endangering human lives would go unaddressed. Martin is also too quick to dismiss the argument that JASTA was intended “for one specific purpose: to allow [9/11] victims’ families to sue Saudi Arabia.”⁴² And even the 9/11 families’ claims, for which the statute was created, have not gone far under JASTA.⁴³ Judges will likely be wary to read into JASTA a new type of claim for cyberattacks that Congress did not specifically anticipate. Applying cyberattacks to these terrorism statutes is like fitting a square peg in a round hole. The state sponsors exception and JASTA were created to mitigate harm for physically destructive acts of terrorism. These exceptions were not drafted to capture the less tangible, but significant harms created by malicious states in cyberspace.

In summary, cyberattacks do not fit under the FSIA’s current exceptions. The current status of the law for foreign sovereign immunity risks creating perverse outcomes for actors in cyberspace. Judge-made derivative foreign sovereign immunity without a new FSIA exception for cyberattacks will mean the worst of both worlds: no accountability for cyberattacks with blanket immunity afforded to both states *and* their cybersecurity contractors.

³⁷ Goldman & Strong, *supra* note 59.

³⁸ Melissa Eddy & Nicole Perlroth, *Cyber Attack Suspected in German Woman’s Death*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/world/europe/cyber-attack-germany-ransomware-death.html>.

³⁹ Patrick Howell O’Neill, *Ransomware Did Not Kill a German Hospital Patient*, MIT TECH. REV. (Nov. 12, 2020), <https://www.technologyreview.com/2020/11/12/1012015/ransomware-did-not-kill-a-german-hospital-patient/>.

⁴⁰ 18 U.S.C. § 2331(1)(A).

⁴¹ Martin, *supra* note 75, at 38.

⁴² Martin, *supra* note 75, at 45.

⁴³ See *In re Terrorist Attacks on Sept. 11, 2001*, 298 F.Supp.3d 631 (S.D.N.Y. 2005).

I. THE SOLUTION: A CYBER ATTACK EXCEPTION TO THE FSIA—ABSOLUTE BARRIERS VS. PROTECTED BUBBLES

Congress should amend the FSIA and add a new exception to address the growing problem of cyberattacks. This paper is not the first to make the case for a new cyber exception. There are a growing number of commentators putting forward options for expanding the FSIA in light of 21st century challenges in cyberspace. A member of Congress has even proposed a bill to enact a cyberattack exception.⁴⁴ Critics, such as Chimène Keitner, argue the bill and other proposals for a cyberattack exception use overbroad language that fails to capture typical malicious cyberattacks and might hamstring legitimate state uses of cyberspace.⁴⁵ This paper agrees with both: the FSIA provides a potential avenue for addressing state-sponsored cyberattacks, and the prior proposals would create more problems than they solve (and do not account for cybersecurity contractors). Rather than using the FSIA to build an “absolute barrier” against any cyberattacks, this paper argues for creating “protected bubbles” around two particularly vulnerable targets—trade secrets and human rights activists.

A. Absolute barriers: prior proposals are too broad

Three authors—Alexis Haller, Paige Anderson, and Benjamin Kurland—put forward separate proposals for a new cyberattack exception to the FSIA, although they all contain the same fatal flaw by creating an absolute barrier against cyberattacks.⁴⁶ Each proposal is comprehensive and contains useful suggestions, the advantages and disadvantages of which are worth highlighting, before addressing their shared pitfall.

In his proposal, Haller emphasizes the provisions of execution of judgments and attachment of assets, particularly under the terrorism exception. In addition to jurisdictional immunity, the FSIA provides immunity from pre-judgment attachment and post-judgment execution of government property. As part of the 2008 terrorism exception amendment, Congress loosened the attachment and execution provisions, which previously stymied plaintiffs from receiving compensation, despite winning on the merits.⁴⁷ These provisions are important because they raise the costs on perpetrating states by allowing a prevailing plaintiff to attach property in the United States belonging to the defendant foreign state and its agencies or

⁴⁴ Homeland and Cyber Threat Act, H.R. 4189, 116th Cong. (2019).

⁴⁵ See Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal With America's Cyber Threats*, LAWFARE BLOG (June 15, 2020, 9:09 AM), <https://www.lawfareblog.com/private-lawsuits-against-nation-states-are-not-way-deal-americas-cyber-threats>.

⁴⁶ See Alexis Haller, *The Cyberattack Exception to the Foreign Sovereign Immunities Act: A Proposal to Strip Sovereign Immunity When Foreign States Conduct Cyberattacks Against Individuals and Entities in the United States*, FSIA LAW (Feb. 19, 2017), <https://fsialaw.com/2017/02/19/the-cyberattack-exception-to-the-foreign-sovereign-immunities-act-a-proposal-to-strip-sovereign-immunity-when-foreign-states-engage-in-cyberattacks-against-individuals-and-entities-in-the-united-stat/>; Paige C. Anderson, *Cyber Attack Exception to the Foreign Sovereign Immunities Act*, 102 CORNELL L. REV. 1087 (2017); Benjamin Kurland, *Sovereign Immunity in Cyber Space: Towards Defining a Cyber-Intrusion Exception to the Foreign Sovereign Immunities Act*, 10 J. NAT'L SECURITY L. & POL'Y, 225, 268-69 (2019).

⁴⁷ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A).

instrumentalities.⁴⁸ Removing immunity from state property is a powerful means for changing the cost-benefit calculus of hacking states.

Anderson models her proposal largely on the terrorism exception under §1605A. She notes that Congress included material support for terrorism because “material support...is just as reprehensible, and just as necessary to deter, as perpetration.”⁴⁹ Hinting at the role of cybersecurity contractors, Anderson includes a material provision in her proposal “to account for the possibility of states using individuals who are not government employees to carry out cyber attacks.”⁵⁰ Anderson’s material support provision is a step in the right direction by outlining the damage even supporting actors may cause. Nevertheless, the model language of her proposal does not address the issue of contractors directly because it still refers to material support by a foreign state.⁵¹

Kurland’s proposal also draws from the terrorism exception, particularly for its punitive damages. In conjunction with attachment and execution of property, punitive damages are important because they further raise the costs of malicious cyberactivity. Additionally, Kurland proposes using a similar designation process as the state sponsor exception, whereby suits may only be brought against a state designated by the Secretary of State as a “cyber-intruder.”⁵² While a designation requirement would limit the effect of Kurland’s broad prohibition on cyberattacks, it would go too far by effectively stonewalling most suits even before they begin. Unlike terrorism, many states conduct cyberattacks. The executive branch is unlikely to upset so many diplomatic relationships with “cyber-intruder” designations, as evidenced by the United States’ poor track record on calling out cyberattacks. As Anderson notes, the United States stayed quiet and refused to make public attribution long after Chinese hackers stole data on 21.5 million Americans from the U.S. Office of Personnel Management in 2015.⁵³

Despite a few differences, all three proposals would remove jurisdictional immunity and create a substantive private cause of action for cyberattacks. Each proposal uses slightly different definitions of cyberattack; however, they share similarly broad language removing immunity for cyberattacks by states with only a few limits. Haller suggests drawing from federal anti-hacking laws, and Kurland explicitly does so, using language from the Wiretap Act and the Computer Fraud and Abuse Act (“CFAA”).⁵⁴ Anderson’s proposal would prohibit cyber activity including “unprivileged access to or use of proprietary electronically-stored information, impairment of the function of a computer system, damage to computer hardware, or the provision of material support or resources for such acts.”⁵⁵ Anderson would limit cyberattacks by requiring they produce “substantial effects” in the United States;⁵⁶ however, she provides no definition for “substantial,” which would likely create significant unpredictability in judicial outcomes.

Anderson also argues her proposal is properly tailored and avoids issues of reciprocity because “all [it] would do...is exclude *private* parties as legitimate targets for foreign

⁴⁸ Haller, *supra* note 86.

⁴⁹ Anderson, *supra* note 86, at 1100.

⁵⁰ Anderson, *supra* note 86, at 1103.

⁵¹ Anderson, *supra* note 86, at 1102.

⁵² Kurland, *supra* note 86, at 270.

⁵³ Anderson, *supra* note 86, at 1107.

⁵⁴ Haller, *supra* note 86; Kurland, *supra* note 86, at 263.

⁵⁵ Anderson, *supra* note 86, at 1102.

⁵⁶ Anderson, *supra* note 86, at 1102.

governments.”⁵⁷ Private parties, however, are not per se illegitimate targets. Law enforcement investigations of transnational criminal organizations and intelligence collection on terrorist organizations are examples of states targeting private parties. Few would argue these are illegitimate purposes. States with legitimate purposes may need to access networks of private companies, even if they are not stealing trade secrets. Anderson’s proposal creates a binary distinction between public and private worlds that is unhelpful for delineating legitimate and illegitimate targets.

The focus by all three proposals on the means—form of cyberattacks—rather than the ends—targets of cyberattacks—is imprudent because there are legitimate uses for cyberspace. Other exceptions, such as terrorism, are easier to draw lines around because it is readily accepted that any form of terrorism is not legitimate statecraft. There is no such consensus around cyberspace. It is an immense hurdle to properly tailor what forms of cyberattacks are permissible, particularly in a field which rapidly innovates new forms of cyberattacks. These proposals tinker around the edges, but each focuses on regulating forms of cyberattacks that are overly broad because they capture a wide range of legitimate and illegitimate cyberattacks. And legitimate and illegitimate cyberattacks are not differentiated by the form of the cyberattack. For example, a state’s cyberattack on a foreign military installation and on a hospital may involve the same cyber tools; however, most people would likely accept that the cyberattack on the hospital is an illegitimate cyberattack. The distinction is driven by the nature of the target. Therefore, an absolute barrier on forms, rather than the targets, of cyberattacks misses the mark.

[Excerpted conclusion provided below]

CONCLUSION

Amending the FSIA will be no easy task. Foreign sovereign immunity in cyberspace raises competing interests related to reciprocity, legitimate uses of cyberattacks, the role of private actors, and norm creation. The new cyberattack exception proposed by this paper strikes the proper balance. Cybersecurity contractors providing services for legitimate activities would enjoy derivative immunity. Companies, such as NSO, who create and sell malware to states using it to threaten human rights would find their immunity stripped away in U.S. courts. The new exception would ensure injured private parties—individuals and companies—are able to affirmatively assert their claims in U.S. courts against malicious state sponsored cyberattacks. The legislative and executive branches are more likely to enact a narrowly tailored exception than a broad proposal prohibiting any cyberattacks. As cyberspace becomes an ever more dynamic and critical domain for competition, the United States should lead in developing prudent norms for legitimate state practice. Cyber risks are rapidly proliferating, and U.S. and international law must catch up. This paper’s exception would provide an effective legislative patch to the FSIA’s cyber gaps. It is time foreign sovereign immunity receives an update for the digital era.

⁵⁷ Anderson, *supra* note 86, at 1107-08.

Applicant Details

First Name	Natalie
Middle Initial	K
Last Name	Simmons
Citizenship Status	U. S. Citizen
Email Address	NKS18@pitt.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>613 Copeland Street Apt. C3</div> <div>City</div> <div>Pittsburgh</div> <div>State/Territory</div> <div>Pennsylvania</div> <div>Zip</div> <div>15232</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	4125846805

Applicant Education

BA/BS From	University of Pittsburgh
Date of BA/BS	April 2020
JD/LLB From	University of Pittsburgh School of Law https://www.law.pitt.edu/
Date of JD/LLB	May 4, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	University of Pittsburgh Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Pitt Law Moot Court Negotiation and Client Counseling Competition: Winner Pitt Law National Moot Court Team Pitt Law Moot Court Appellate Competition: Winner

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **Yes**

Post-graduate
Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Kelly, Maureen P.
Nancy_Fabi@pawd.uscourts.gov
412-208-7450

Nixon, Marily
marilynixon@pitt.edu
9196191968

Linsenmeyer, Allie
alinsenmeyer@pitt.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Natalie K. Simmons

613 Copeland Steet Apt. C3, Pittsburgh, PA 15232 • (412) 584-6805 • nks18@pitt.edu

June 12, 2023

The Honorable Juan R. Sánchez
Chief Judge, U.S. District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

Please consider my application for a clerkship in your chambers for the 2024–2025 term. I am currently a rising third-year student at the University of Pittsburgh School of Law and the Senior Managing Editor of the University of Pittsburgh Law Review.

An aspiring litigator, I spent last summer as a judicial intern for Judge Maureen P. Kelly on the United States District Court for the Western District of Pennsylvania, and I presently work as a Summer Associate at Buchanan Ingersoll & Rooney PC. I am confident that these experiences will prepare me to contribute meaningfully to your chambers.

Enclosed please find my resume, transcripts, references, and writing sample. Letters of recommendation from the following people will be sent under separate cover:

The Honorable Maureen P. Kelly, *Magistrate Judge*
United States District Court for the Western District of Pennsylvania
Chambers' Phone: (412) 208-7450

Alexandra Linsenmeyer, *Dean of Students of the University of Pittsburgh School of Law*
alinsenmeyer@pitt.edu
Cell Phone: (412) 651-4683

Marily Nixon, *Professor of Practice*
marilynixon@pitt.edu

Thank you for considering my application. I hope to have the opportunity to interview with you.

Respectfully,



Natalie K. Simmons

Natalie K. Simmons

613 Copeland Steet Apt. C3, Pittsburgh, PA 15232 • (412) 584-6805 • nks18@pitt.edu

EDUCATION

University of Pittsburgh School of Law, Candidate for J.D., May 2024

University of Pittsburgh Law Review, Volume 85, *Senior Managing Editor*

GPA: 3.509 Legal Research Grade: A+

Honors: Pitt Law Moot Court Negotiation and Client Counseling Competition Winner (2023); Pitt Law Moot Court Appellate Competition Winner (2022); CALI Award (How Lawyers Made America); John P. Gismondi Public Interest Scholarship

Activities: Pitt Law National Moot Court Team; Teaching Assistant (Property, Academic Success); Pitt Law Women's Association (*President*); If/When/How (*1L Representative*); Pitt Law Ambassadors; Pitt OUTLaw

University of Pittsburgh, B.A., *magna cum laude*, May 2020

Majors: Politics & Philosophy (Honors College); Gender, Sexuality, & Women's Studies *Minor*: French

Honors: Dean's List; Beeson Women's Empowerment Award; Panhellenic President of the Year; Omicron Delta Kappa Society; Gamma Sigma Alpha Society; Order of Omega; Homecoming Court

Activities: Kappa Delta Sorority (*President*; *Secretary*); Student Government Board (*Governmental Relations Committee V.P.*; *Judicial Committee Secretary*); Make-A-Wish (*V.P. Public Relations*); Pitt Dance Marathon

EXPERIENCE

Buchanan Ingersoll & Rooney PC, Pittsburgh, PA

Summer Associate, May 2023 – August 2023

U.S. District Court for the Western District of Pennsylvania, Pittsburgh, PA

Judicial Intern – The Honorable Maureen P. Kelly, May 2022 – August 2022

- Conducted legal research and drafted Reports and Recommendations, Memorandum Orders, Orders to Show Cause, Orders for Motions to Dismiss, Rule 58 Orders, and Opinions for civil disputes and *pro se* habeas corpus claims
- Observed 100+ federal court proceedings: complex litigation dispute hearings, pre-trial detention hearings, sentencings, Rule 16 and Rule 26(f) meetings, multidistrict litigation, RISE Court, and civil and criminal jury trials

Kappa Delta Headquarters, Memphis, TN

Leadership Development Consultant; Collegiate Experience Associate, June 2020 – July 2021

- Oversaw 18 chapters, 17 local advisory support boards, and 2 national division leadership teams (2,000+ members)
- Authored inclusion policy; new member programming; and risk management procedure for 180,000+ members

Bootay Bevington & Nichols LLC, Pittsburgh, PA

Paralegal, June 2018 – January 2020

- Conducted 500+ title searches; organized 200+ client books; and communicated routinely with 50+ clients through in-person meetings and electronic and written correspondence

University of Pittsburgh: Office of Admissions and Financial Aid, Pittsburgh, PA

Pitt Pathfinder Tour Guide and Student Ambassador, September 2016 – April 2020

- Collaborated to recruit and tour 70,000+ annual visitors; presented at leadership showcase to 300+ weekly visitors

University of Pittsburgh: Department of Political Science, Pittsburgh, PA

Undergraduate Research Assistant, January 2018 – December 2018

- Researched American cities' human rights and relations commissions and drafted a cumulative report arguing the City of Pittsburgh change its designation to afford stronger civil rights protections to its citizens

COMMUNITY AFFILIATIONS & INTERESTS

- **Community Affiliations**: Allegheny County Housing Court Help Desk, *Volunteer*; Allegheny County Bar Association, *Law Student Member*; American Foundation for Suicide Prevention, *Field Advocate*
- **Interests**: boxing; hot yoga; "reality" television; personality tests; farmers' markets

GRADUATE/PROFESSIONAL ACADEMIC RECORD

Natalie Katherine Simmons



University of Pittsburgh

Institution: University of Pittsburgh
4200 Fifth Avenue
Pittsburgh, PA 15260
Print Date: 05/30/2023

Degrees Awarded

Degree: **Bachelor of Arts**
Confer Date: 04/25/2020
Degree GPA: 3.549
Degree Honors: Magna Cum Laude
Plan: Gender, Sexuality, and Women's Studies and Politics-Philosophy

Degree: **Minor**
Confer Date: 04/25/2020
Plan: French

Beginning of Law Record

Fall Term 2021-2022

Program: School of Law
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAW 5020	CONTRACTS	4.00	4.00	B	12.000
LAW 5028	TORTS	4.00	4.00	B-	11.000
LAW 5032	LEGISLATION AND REGULATION	3.00	3.00	B	9.000
LAW 5046	CRIMINAL LAW	3.00	3.00	B	9.000

Term GPA: 2.929 Term Totals: 14.00 14.00 41.000

Cum GPA: 2.929 Cum Totals: 14.00 14.00 41.000

Spring Term 2021-2022

Program: School of Law
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAW 5024	PROPERTY	4.00	4.00	A-	15.000
LAW 5033	CIVIL PROCEDURE	4.00	4.00	B+	13.000
LAW 5062	PITT LAW ACADEMY	0.00	0.00	S	0.000
LAW 5076	LEGAL ANALYSIS AND WRITING	4.00	4.00	A-	15.000
LAW 5101	CONSTITUTIONAL LAW	4.00	4.00	B	12.000

Term GPA: 3.438 Term Totals: 16.00 16.00 55.000

Cum GPA: 3.200 Cum Totals: 30.00 30.00 96.000

Fall Term 2022-2023

Program: School of Law
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAW 5129	FEDL COURTS & FEDL LITIGATION	3.00	3.00	A	12.000
LAW 5138	FEDERAL APPELLATE ADVOCACY	3.00	3.00	A	12.000
LAW 5320	LITIGATION STRATEGY & PLANNING	2.00	2.00	A	8.000
LAW 5386	FOUNDATIONS OF LEGAL RESEARCH	1.00	1.00	A+	4.000
Course Attributes: Online Asynchronous					
LAW 5755	RACIAL HARASSMENT IN WORKPLACE	3.00	3.00	A+	12.000
LAW 5902	INDEPENDENT STUDY	1.00	1.00	S	0.000
LAW 5910	LAW REVIEW	1.00	1.00	S	0.000
LAW 5969	SUMMER EXTERNSHIP	4.00	4.00	S	0.000

Term GPA: 4.000 Term Totals: 18.00 18.00 48.000

Cum GPA: 3.429 Cum Totals: 48.00 48.00 144.000

Spring Term 2022-2023

Program: School of Law
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAW 5103	EVIDENCE	3.00	3.00	S	0.000
LAW 5112	BUSINESS ORGANIZATIONS	3.00	3.00	B+	9.750
LAW 5189	HOW LAWYERS MADE AMERICA	3.00	3.00	A+	12.000
LAW 5647	INTRODUCTORY ENTERTAINMENT LAW	3.00	3.00	A+	12.000
Course Attributes: Hybrid					
LAW 5680	INTERNATIONAL INSOLVENCY	3.00	3.00	A-	11.250
LAW 5818	LAW INTERSESSION	1.00	1.00	A	4.000
Course Topic: MINDFUL LIVING-HEALTHY LAWYER					
LAW 5902	INDEPENDENT STUDY	1.00	1.00	S	0.000
LAW 5902	INDEPENDENT STUDY	1.00	1.00	S	0.000
LAW 5910	LAW REVIEW	1.00	1.00	S	0.000

Term GPA: 3.769 Term Totals: 19.00 19.00 49.000

Cum GPA: 3.509 Cum Totals: 67.00 67.00 193.000



Maureen P. Kelly
U.S. Magistrate Judge

United States District Court

Western District of Pennsylvania
Suite 9280, U.S. Post Office & Courthouse
Seventh Avenue & Grant Street
Pittsburgh, Pennsylvania 15219

Telephone
(412) 208-7450
Fax
(412) 208-7457

April 5, 2023

Re: Natalie K. Simmons

To Whom it May Concern:

This letter is submitted to most highly recommend Natalie K. Simmons to you for a judicial law clerk position in your chambers.

Ms. Simmons is an intelligent, dynamic, and hard-working young woman who was a judicial intern with me for the Summer of 2022. In my twelve years on the Court, Natalie was by far the best judicial intern who has worked with me. She demonstrated a genuine interest in learning about federal court practice that was displayed in both civil and criminal matters. Natalie assisted with preparing for civil status conferences and court proceedings, and often asked questions or made suggestions that I would expect from a 5-7 year lawyer. With just one year of law school under her belt, she had a remarkable ability to identify and articulate applicable law relative to assigned motions. She also completely immersed herself in assigned criminal matters, learning as much as possible about initial criminal appearances, detention hearings, and search warrant standards. Her writing skills are superb. I had her prepare several draft memorandum orders on pending motions that required minimal revisions. Natalie was mature and professional in interacting with court staff, lawyers, and litigants, and always willing to do anything that needed to be done to help chambers' operations.

At the University of Pittsburgh School of Law, Ms. Simmons has excelled in legal writing and oral advocacy. She is the Senior Managing Editor of the University of Pittsburgh Law Review. Natalie won the Pitt Law Moot Court Negotiation and Client Counseling Competition in 2023 and the Moot Court Competition in 2022. As a result of her advocacy skills, Natalie is a member of Pitt's national moot court competition team. Additionally, I was informed by two of my colleagues who judged the 2023 final competition that Natalie's advocacy skills were most impressive.

If I had an open law clerk position, I would be thrilled to hire Ms. Simmons. Based on my experience of working with Natalie, I believe that she would be a most positive asset to your chambers and court service.

Please contact me if I can answer any questions.

Respectfully,


MAUREEN P. KELLY



University of Pittsburgh
School of Law

Barco Law Building
3900 Forbes Avenue
Pittsburgh, PA 15260
412-648-1400
law.pitt.edu

June 8, 2023

Letter of Recommendation for Clerkship Candidate Natalie K. Simmons

To Whom It May Concern:

I am delighted to write this Letter of Recommendation for Natalie Simmons to serve as a federal judicial clerk. Natalie is a talented legal scholar and a highly focused, self-starting, and reliable colleague who would be a valuable addition to your chambers.

I know Natalie both as a student and as a teaching assistant; she was outstanding in both roles. Natalie took my Spring 2022 Property Law class in her 1L year. She was a strong student, earning one of the highest grades in the class. As a student, Natalie was serious, organized, perceptive, and hard working. She was willing to speak up in class and easily held her ground in legal and policy debates. At the same time, she was able to see the strengths of opposing arguments, and to parry them effectively. She is self-confident and has extremely high standards, for herself and others (more about others in my discussion of her as a teaching assistant, below). And she put in the work: she took the time to attend my office hours to be sure she was getting the most out of the class and she challenged me (respectfully) when my explanations were unclear or inadequate. I enjoyed our conversations because of Natalie's intellectual curiosity and drive.

Based on my positive impressions of Natalie as a student, I engaged her as a teaching assistant for Property in Spring 2023.

The first thing I learned about Natalie as a TA is that she is adept at analyzing an issue and building a solution. My students' grades are composed of several elements and, therefore, require some administrative organization. Noticing that I was inputting grades manually into two different platforms, Natalie and her fellow TA immediately (and without being asked) created a centralized system for tracking grades, which they shared with me and updated throughout the course. I was impressed that Natalie saw a need, created a seamless solution to it, and then carried through on the solution. That told me that she is not only an excellent law student, but also a strategic thinker who willingly takes on tasks necessary to improve the work of her team. She continued to show initiative and strong follow-through during the entirety of the course.

The next thing I learned about Natalie as a TA is that she has very high standards for herself and is able to hold others to high standards as well. I was quite impressed at the fairness and firmness she showed other students who made requests that were unreasonable (for example, for an extension on a quiz or to be counted “present” when they were too late for class under ABA rules). At the same time, Natalie mentored several students who were struggling academically or personally, and I know of at least one student who I don’t think would have passed the class without Natalie’s support.

The third thing I learned about Natalie as a TA is that she is quite effective at distilling the law in a straightforward way that helps other students to better understand it. She worked one-on-one with 20 students “assigned” to her and also taught review sessions to the entire 41-student class prior to the midterm test and the final exam. The students were uniformly impressed (as was I) with the clear, careful way Natalie presented the applicable law and with the professionalized way she presented it, using a comprehensive slide set she developed for that purpose and several hypotheticals aimed at preparing students for the tougher questions on the midterm and final.

Finally, I learned when working with Natalie as a TA is that she is an excellent communicator. She was highly responsive, quickly returning emails to both students and me with thoughtful, professional, thorough answers. And, importantly, she was always good natured and positive to work with.

For the reasons discussed above, Natalie would be an excellent hire as a federal judicial clerk. She would be a valuable colleague and would interact well with judges, court staff, fellow clerks, and parties to litigation. Based on my observations of Natalie Simmons as a student and a TA over the past nearly two years, I enthusiastically recommend her as a candidate for a judicial clerkship. I would be happy to answer any questions regarding her candidacy.

Sincerely yours,

Marily Nixon

Marily Nixon
Professor of Practice

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to provide my highest recommendation for Natalie Simmons for consideration of a federal clerkship position within your chambers. Having had the privilege of working closely with Natalie as the Dean of Students at Pitt Law, I have had the opportunity to witness firsthand her exceptional legal acumen, dedication, and strong work ethic. I knew early on that Natalie would truly enhance the law school, and I have had the pleasure of watching her grow and thrive during her first two years of legal studies.

Throughout her time at Pitt Law, Natalie consistently demonstrated a profound understanding of complex legal issues and an ability to analyze them thoroughly. Her written work is of the highest quality, characterized by meticulous research, clear and concise analysis, and persuasive arguments. Moreover, Natalie has a remarkable talent for crafting well-reasoned and persuasive oral arguments, which she showcased during her participation in the Pitt Law Moot Court Appellate Competition, of which she was the winner.

Not only does Natalie possess exceptional legal skills, but she also possesses an exemplary work ethic and professionalism. She consistently demonstrated an unwavering commitment to producing outstanding work products within strict deadlines. Her attention to detail is impeccable, ensuring that her work is thorough, accurate, and of the highest standard. Natalie approaches each task with enthusiasm and a desire to excel, consistently going above and beyond the expectations set forth. I am so impressed by her commitment to her work as well as others- she demonstrates these skills in the classroom, but also as a Teaching Assistant in multiple subject areas.

Furthermore, Natalie possesses exceptional interpersonal and communication skills. She is a highly effective communicator, both in writing and in person, and has the ability to convey complex legal concepts to a diverse audience in a clear and concise manner. Her ability to collaborate and work effectively within a team setting is outstanding, as she demonstrates an open-mindedness and receptiveness to different perspectives. As President of the Pitt Law Woman's Association, she led efforts engaging in civil action, fostering internal networks and strengthening external ones, dedicated time to philanthropy, as well as launching new initiatives and programs.

In addition to her impressive academic and professional achievements, Natalie has demonstrated a strong commitment to public service and a genuine passion for the law. She actively seeks opportunities to contribute to the legal community and to society at large. Her involvement in pro bono work as an Allegheny County Housing Court Help Desk volunteer as well as serving as a field advocate for the American Foundation for Suicide Prevention exemplifies her dedication to using her skill set to make a positive impact on the lives of others.

Considering Natalie's outstanding legal abilities, exceptional work ethic, unparalleled professionalism, and dedication to public service, I am confident that she would be an excellent addition to your chambers. I have no doubt that she would excel in a federal clerkship role and make substantial contributions to the court's work. Having worked with law students at Pitt Law for the past eighteen years, I have been fortunate to witness true excellence. Natalie ranks in the top 1% of students that I have had the privilege of working with during my tenure.

Should you require any further information or have any questions, please do not hesitate to contact me. Thank you for your time and consideration. I wholeheartedly recommend Natalie Simmons for a federal clerkship position and am confident that she will be an exceptional asset to your chambers.

Sincerely,

Alexandra M. Linsenmeyer
Assistant Dean of Students
University of Pittsburgh School of Law

Allie Linsenmeyer - alinsenmeyer@pitt.edu

Natalie K. Simmons

613 Copeland Steet Apt. C3, Pittsburgh, PA 15232 • (412) 584-6805 • nks18@pitt.edu

Writing Sample

The attached writing sample is an opinion I wrote for the Federal Appellate Advocacy course taught by Judge D. Michael Fisher at the University of Pittsburgh School of Law in the fall semester of the 2022–2023 academic year. Judge Fisher is a Senior Circuit Judge on the United States Court of Appeals for the Third Circuit and a Distinguished Jurist Fellow at Pitt Law.

The opinion deals with *Reed v. Goertz*, a death row case arising from a 1996 rape and murder. The case was argued before the Supreme Court of the United States in October 2022. The appeal centered on an issue as to whether the statute of limitations for a 42 U.S.C. § 1983 claim seeking DNA testing of crime-scene evidence begins to run at the end of state court litigation denying DNA testing (including any appeals) or at the moment the state court denies DNA testing (despite any appeals).

For class purposes for which the opinion was written, the opinion includes some fictitious nature, such as the existence of the “United States Court of Appeals for the Fifth Circuit Appellate Panel” and the names of judges and counsel. All other opinion facts are based on the case.

OPINION OF THE COURT

DOE, *Circuit Judge*.

In May 1997, Mr. Rodney Reed was charged with capital murder for the death of Ms. Stacey Stites. Since, Mr. Reed has maintained a claim of actual innocence and engaged in over twenty years of litigation attempting to exonerate himself from what he alleges to be a wrongful conviction. To date, Mr. Reed's attempts at exoneration have been unfruitful.

After state court determination that he failed to meet requirements for post-conviction DNA testing, Mr. Reed filed a Section 1983 claim in federal court against Bastrop County District Attorney Mr. Bryan Goertz. The lower federal courts dismissed Mr. Reed's case for failure to state a claim. Mr. Reed's appeal presents the question of when his claim accrued. We will affirm the denial of the motion to dismiss for lack of subject matter jurisdiction and affirm the grant of the motion to dismiss for failure to state a claim.

I.

A. Factual History

In April 1996, Ms. Stites, a nineteen-year-old woman, was found dead on the side of a rural road in Bastrop County, Texas. *Reed v. Goertz*, 995 F.3d 425, 427 (5th Cir. 2021). Investigation revealed Ms. Stites was murdered by seatbelt strangulation after being sexually assaulted. *Id.* at 428. Sperm was found inside Ms. Stites's vagina, which was eventually determined to match suspect Mr. Reed's genetic profile. *Id.*

In May 1997, Mr. Reed was charged with capital murder for the death of Ms. Stites. *Id.* at 429. At trial, Mr. Reed

asserted someone else murdered Mr. Stites, likely her fiancé Mr. Jimmy Fennell. *Reed v. State*, 541 S.W.3d 759, 775 (Tex. Crim. App. 2017). Nevertheless, a jury found Mr. Reed guilty, and he was sentenced to be executed. *Id.* at 763.

Mr. Reed appealed his conviction to the Texas Court of Criminal Appeals (“CCA”), which rejected his claim, citing, *inter alia*, the strength of the DNA evidence against him. *Reed v. Goertz*, 995 F.3d at 428. Since, Mr. Reed has engaged in over twenty years of litigation—each application dismissed or denied—alleging that newly discovered evidence demonstrates his innocence and Texas’s refusal to disclose certain evidence violates his rights. *Id.*

In July 2014, Mr. Reed—pursuant to Article 64 of the Texas Code of Criminal Procedure—moved for post-conviction DNA testing of numerous items from the crime scene. *Reed v. State*, 541 S.W.3d at 764–65. In November 2014, the trial court denied Mr. Reed’s motion. *Id.* On appeal, the CCA remanded the case to the trial court for further findings of fact and conclusions of law. *Id.* In September 2016, the trial court determined Mr. Reed’s Article 64 motion failed to establish: (1) appropriate chain of custody for the materials he sought to have tested; (2) reasonable probability that exculpatory DNA results would exonerate him; and (3) that his motion was not made to unreasonably delay the execution of his sentence. *Id.* at 780; Tex. Code Crim. Proc. Ann. art. 64.03 (West 2017) (providing the requirements for an Article 64 motion).

On Mr. Reed’s subsequent appeal in April 2017, the CCA issued an opinion affirming the trial court’s denial of the motion. *Reed v. State*, 541 S.W.3d at 780. Mr. Reed then motioned for rehearing, which the CCA denied in October 2017. *Id.* at 759. In June 2018, Mr. Reed appealed the CCA’s

decision to the Supreme Court of the United States, which denied certiorari. *Reed v. Texas*, 138 S. Ct. 2675 (2018).

B. Procedural History

In August 2019, Mr. Reed filed a claim under 42 U.S.C. § 1983 against Mr. Goertz in the United States District Court for the Western District of Texas. *Reed v. Goertz*, No. A-19-CV-0794-LY, 2019 U.S. Dist. WL 12073901 at *1 (W.D. Tex. Nov. 15, 2019) [hereinafter “DC”]. In his amended complaint, Mr. Reed challenged the constitutionality of Article 64 on its face and “as interpreted, construed and applied by the CCA.” *Reed v. Goertz*, 995 F.3d at 428. Mr. Reed sought declaratory relief alleging he was denied due process. *Id.* at 428–29. Mr. Goertz moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *Id.*

On November 15, 2019, the District Court granted in part Mr. Goertz’s 12(b)(6) motion and denied in part his 12(b)(1) motion. DC at *1. In holding Mr. Reed failed to state a claim upon which relief may be granted, the Court reasoned, “there is nothing inadequate about how Chapter 64’s procedures apply to those who seek access to DNA evidence.” *Id.* at *10. In holding it had subject matter jurisdiction, the Court reasoned the *Rooker-Feldman* doctrine did not apply. *Id.* at *5. Mr. Reed appealed to the United States Court of Appeals for the Fifth Circuit Appellate Panel. *Reed v. Goertz*, 995 F.3d 425.

On April 22, 2021, the Fifth Circuit affirmed the District Court’s dismissal, holding “Reed’s claim is barred by the statute of limitations.” *Id.* at 427, 431. Though the District Court did not address the timeliness issue, the Fifth Circuit determined Mr. Reed’s claim was untimely because it accrued in November 2014. *Id.* at 431. The Court further held *Rooker-*

Feldman did not bar jurisdiction. *Id.* at 429–31. Mr. Reed appeals.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2202, as well as under 42 U.S.C. § 1983. The Fifth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1291.

We review a court’s jurisdictional determinations de novo and exercise plenary review. *Great W. Mining & Min. Co. v. Fox Rothschild LLP*, 615 F.3d 159, 163 (3d Cir. 2010); *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010). Deciding whether a statute of limitations has expired is a question of law that we review de novo and exercise plenary review. *Stafford v. E.I. Dupont De Nemours*, 27 F. App’x. 137, 139 (3d Cir. 2002); *Schieber v. City of Philadelphia*, 320 F.3d 409, 415 (3d Cir. 2003).

In considering our jurisdiction to hear this appeal, we affirm the Fifth Circuit’s holding that the *Rooker-Feldman* doctrine does bar review of Mr. Reed’s claim. *Rooker-Feldman* was born out of a pair of Supreme Court decisions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), wherein the Court determined that federal district courts “are precluded from exercising appellate jurisdiction over final state court judgments.” *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (per curiam) (explaining the *Rooker-Feldman* doctrine). The doctrine’s applicability is narrow and “confined to cases . . . brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

This Court has adopted a four-pronged elemental approach to determine whether a claim is barred by *Rooker-Feldman*. *Fox*, 615 F.3d at 166.

Our elemental approach renders Mr. Goertz's *Rooker-Feldman* argument invalid. Mr. Reed succeeds on the first three prongs but fails on prong four, "the plaintiff is inviting the district court to review and reject the state judgments." *Id.* at 166. In both *Rooker* and *Feldman*, the plaintiffs lost in state court and asked the federal district courts to overturn a state court decision. *Rooker*, 263 U.S. at 144; *Feldman*, 460 U.S. at 479–80. Dissimilarly, Mr. Reed seeks only to have his due process rights vindicated by the federal courts. *See Fox*, 615 F.3d at 168 ("[A] federal plaintiff who was injured by a state-court judgment is not invariably seeking review and rejection of that judgment."). He does not challenge the CCA's decision but instead challenges Article 64 as authoritatively construed. Regardless of this case's outcome, the CCA's ruling remains intact. *See Exxon*, 544 U.S. at 292–93 (explaining that neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction disappears if a state court reaches judgment on the same question while the case remains *sub judice* in a federal court). In other words, we are not "scrutinizing and invalidating any individual state court judgment." *Fox*, 615 F.3d at 168 (quoting *Adkins v. Rumsfeld*, 464 F.3d 456, 464 (4th Cir. 2006) ("[A] declaration would not, however, amount to appellate reversal or modification of a valid state court decree.") (internal quotation marks omitted)). Because *Rooker-Feldman* does not apply, this Court has subject matter jurisdiction over Mr. Reed's claim.

III.

For three reasons, we affirm the Fifth Circuit's finding that Mr. Reed's Section 1983 claim is untimely. First, Mr.

Reed failed to file his action within the applicable two-year statute of limitations. Second, Mr. Reed’s claim accrued in September 2016. Third, this case does not require this Court to adopt a new accrual rule.

A. Section 1983 Claim Against Mr. Goertz

Section 1983 does not create substantive rights but instead provides a federal cause of action where there has been an injury, under color of state law, to a person’s guaranteed constitutional or federal statutory rights. *Wilson v. Garcia*, 471 U.S. 261, 278 (1985), *superseded by statute on other grounds as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Mr. Reed’s initial claim challenged the constitutionality of Article 64 “on its face” and as construed by the state courts. *Reed v. Goertz*, 995 F.3d at 428. On appeal, Mr. Reed abandoned his first claim. As discussed below, his second claim—challenging the state court’s construal—is untimely.

1. Applicable Statute of Limitations

Mr. Reed’s claim is untimely because he failed to file it within Texas’s two-year statute of limitations.

While Section 1983 is a federal cause of action, federal law looks to state law to determine the applicable statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The length of the statute of limitations is determined by the personal injury tort law of the state in which the cause of action arose. *Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009). Texas, as the parties agree, is the applicable state here.

In Texas, the statute of limitations for a personal injury claim is provided in Section 16.003(a) of the Texas Civil Practice and Remedies Code, which holds “a person must bring suit for. . . . personal injury . . . not later than two years after

the day the cause of action accrues.” Tex. Civ. Prac. & Rem. Code § 16.003(a) (2005). Thus, Mr. Reed—a convicted defendant seeking relief under Section 1982—must have filed his claim within two years of the accrual date. *See Young v. Phila. Cnty. Dist. Att’y’s Off.*, 341 F. App’x. 843, 845 (3d Cir. 2009). Mr. Reed filed his claim in August 2019—eleven months outside the limitations period.

2. Accrual

The parties’ dispute hinges on when Mr. Reed’s claim accrued. Mr. Reed argues his claim accrued upon the October 2017 denial of rehearing. By contrast, Mr. Goertz argues that Mr. Reed’s claim accrued upon either the trial court’s 2016 decision or the CCA’s April 2017 decision. We agree with Mr. Goertz and find Mr. Reed’s claim accrued in September 2016.

Although state law determines the applicable statute of limitations for a Section 1983 claim, federal law determines when a cause of action accrues. *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019). Accrual is the occurrence of damages caused by a wrongful act, which happens when a plaintiff has “a complete and present cause of action” in that they can file suit and obtain relief. *Wallace*, 549 U.S. at 388; *see also Dique v. New Jersey State Police*, 603 F.3d 181 (3d Cir. 2010). Generally, a cause of action accrues at the time of the plaintiff’s injury. *Kach*, 589 F.3d at 634 (citing *United States v. Kubrick*, 444 U.S. 111, 120 (1979)). However, the standard for determining “the time at which a claim accrues is an objective inquiry; we ask not what the plaintiff actually knew but what a reasonable person should have known.” *Id.* Accordingly, a Section 1983 action may accrue even when the full extent of an injury is not then known or predictable to a plaintiff. *Id.* at 626 (citing *Wallace*, 549 U.S. at 391); *see also Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 599 (3d Cir. 1998). Mr.

Reed's personal convenience and motivation are not legally cognizable factors to determine the accrual date of his claim.

Mr. Goertz notes that if Mr. Reed did not suffer damages at the moment the trial court first construed Article 64, then he would not have appealed its decision. We agree, which leads us to select a different accrual date than the Fifth Circuit's November 2014 selection. The trial court first denied Mr. Reed's Article 64 motion in November 2014, but this denial did not construe the statute in the way in which Mr. Reed alleges deprived him due process. It was not until September 2016, on remand from the CCA, that the trial court rendered additional findings of fact and conclusions of law which Mr. Reed alleges injured him. The CCA's April 2017 upholding merely confirmed that Mr. Reed's injury had already occurred.

Mr. Reed's accrual argument fails because it incorrectly applies precedent. Mr. Reed attempts to make a legal comparison between his circumstances and those of the plaintiff in *Skinner v. Switzer*. While we agree with Mr. Reed that his factual circumstances are similar to those presented in *Skinner*, his legal analogy fails because *Skinner* involved a facial challenge whereas Mr. Reed's case involves an as-applied challenge. See *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). Furthermore, *Skinner* does little to advance Mr. Reed's accrual argument because it merely held challenges to DNA testing procedures are within the orbit of Section 1983; it did not address claim accrual. See *id.* at 534.

Additionally, Mr. Reed's contention that his injury occurred when the CCA denied rehearing is at odds with Texas Appellate Procedure. Motions for rehearing are not requirements for plaintiffs seeking post-conviction DNA testing, nor does a denial of rehearing develop the record by changing the court's application of law to fact. See Tex. R.

App. P. 74.9, 79.5. Accordingly, the CCA's denial of rehearing did not change Mr. Reed's rights or cause new injury. The denial simply represented the CCA's affirmation of the trial court's legal conclusion. As such, we find the issuance of the trial court's September 2016 opinion to be the time of Mr. Reed's alleged injury, and thus, the date on which his claim accrued.

3. Traditional Accrual Analysis, Exhaustion & Public Policy

A traditional accrual analysis of Mr. Reed's claim supports well-established precedent that Section 1983 does not require state court exhaustion. Unless there is a bar to the suit, a claim that is cognizable under Section 1983 "should immediately go forward" *Edwards v. Balisok*, 520 U.S. 641, 649 (1997). Settled precedent certainly *encourages* convicted defendants seeking post-conviction DNA testing to invoke state law remedies, but courts have routinely declined to mandate exhaustion. *See, e.g., Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009). Accordingly, Mr. Reed was not required to wait for the potential resolution of his state court suits before filing a Section 1983 claim in federal court. As soon as the trial court issued its September 2016 opinion, Mr. Reed's claim accrued, allowing him to exit state court and file his claim in federal court.

Although we agree with Mr. Reed that a traditional accrual analysis may result in parallel litigation and further costs, that does not justify abandoning precedent. Courts need not reject the traditional accrual analysis purely because it may cause hardship to a criminal defendant. *Wallace*, 549 U.S. at 396 ("But when has it been the law that a criminal defendant . . . is absolved from all other responsibilities that the law would otherwise place upon him?"). A remedy such as equitable tolling is incredibly rare and is only applied in unusual

circumstances, “not [as] a cure-all for an entirely common state of affairs.” *Id.* at 396. Foregoing our traditional accrual analysis would both allow accrual-date shopping and place “the statute of repose in the sole hands of the party seeking relief.” *Id.* at 391. We refuse to reward dilatory behavior with specially created rules and exceptions.

To address the Federalism concerns highlighted by both parties, we point to the abstention doctrine. In *Railroad Commission v. Pullman Company*, the Supreme Court created an abstention regime for plaintiffs challenging the constitutionality of a state law or policy. *See* 312 U.S. 496 (1941). To avoid friction with state policies, federal courts are to abstain from hearing constitutional challenges to state laws until state courts can pass on the issue. *Id.* at 500. In cases where abstention is appropriate, the Court need not change its methodology for determining accrual. *Wallace*, 549 U.S. at 396. The existence of the *Pullman* abstention tool supports our finding that this case lacks reason to adopt a new accrual rule.

Noteworthy too is public policy, which requires upholding the purpose of statutes of limitation—requiring reasonably diligent presentation of tort claims against defendants. *See id.* at 397 (“States and municipalities have a strong interest in timely notice of alleged misconduct by their agents.”). To respect and protect Texas’s limitations period, we must find Mr. Reed’s claim untimely.

* * *

In reaching this conclusion, we are mindful of the sensitivity of Mr. Reed’s claim. Increased access to post-conviction DNA testing serves crucial interests of civil rights, but *access* must not be confounded with *process*. For the reasons explained above, we hold that Mr. Reed’s claim is untimely.

IV.

We will affirm the denial of Mr. Goertz's 12(b)(1) motion and affirm the grant of his 12(b)(6) motion.